REVISED CODES OF MONTANA

1947

REPLACEMENT

VOLUME TWO

PART 2

REVISED CODES OF MONTANA

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REVISED CODES OF MONTANA

1947

ANNOTATED

NINE VOLUMES

COMPILED, REVISED AND ANNOTATED
UNDER CHAPTER 184, LAWS OF 1945 AND CHAPTER 266, LAWS OF 1947
AND PUBLISHED UNDER CHAPTER 43, LAWS OF 1947

I. W. Choate
Wesley W. Wertz
CODE COMMISSIONERS

REPLACEMENT
VOLUME 2
PART 2

Damages and Relief to Food and Drugs

Containing the Permanent Laws of the State in Force at the Close of the Fortieth Legislative Assembly of 1967

Publishers

THE ALLEN SMITH COMPANY

Indianapolis, Indiana



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PREFACE

The State of Montana continues to grow in its diversification of industries, and in the development of new interests, cultural and business, by its expanding population. So indeed does its jurisprudence, both statutory and case law, develop to meet the changing times.

The original Volume Two of the REVISED CODES OF MONTANA, 1947 was first replaced after the 1955 session of the Legislative Assembly. By the time of the 1965 Supplement, over 300 pages of new laws, amendments and annotations had been compiled into the supplement for this volume, and much of the statutory law contained in the first replacement volume had become obsolete by repeal or amendment. New laws included the Securities Act of Montana and legislation pertaining to credit unions, metropolitan sewer systems, county water districts, and county zoning; numerous and important amendments had been made in the fields of county government, elections, and fish and game.

For these reasons, a new issue of Volume Two became essential under the replacement program approved by the State authorities and the Montana Bar Association. A new issue was in process in 1966, when it became apparent that the Model Business Corporation Act and its companions covering nonprofit and religious corporations would be introduced and probably enacted at the 1967 session of the Legislative Assembly. At the request of State authorities, the Publishers then postponed the publication of this Replacement Volume Two in order to include the acts of the 1967 session.

The 1967 edition of Replacement Volume Two has been published in two parts in order to provide books that are not too cumbersome and to permit supplementation for a longer period. Part 1 includes Titles 12 through 16, and Part 2 contains Titles 17 through 27. This should make the volumes easier to handle and should postpone the necessity for further replacement.

This Replacement Volume Two contains all existing laws in the above titles, through the regular session and the first extraordinary session of the Fortieth Legislative Assembly, and all notes and annotations have been brought to date. Excluded are obsolete laws, local and special laws, appropriation acts, resolutions, and enacting and repealing clauses.

The arrangement and numbering system of the original volume have been retained; hence the General Index and its supplement may be used as before in locating particular laws. Legislative history references have been brought to date and no changes have been made in the general style used heretofore.

PREFACE

Annotations have been added covering decisions of the Supreme Court of Montana and of the United States Supreme Court and other Federal courts through volume 146 Montana Reports, volume 420 Pacific 2d, volume 384 United States Reports, volume 16 Lawyers' Edition 2d, volume 86 Supreme Court Reporter, volume 367 Federal Reporter 2d, and volume 259 Federal Supplement.

This volume may be cited as Repl. Vol. 2 (Part 2), Revised Codes of Montana, 1947. For references to sections, we recommend "Sec. ——, Repl. Vol. 2 (Part 2), Revised Codes of Montana, 1947."

To Wesley W. Wertz, Code Commissioner of the 1947 Codes, we extend our thanks for his advice and able assistance in the preparation of this Replacement.

The Publishers

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TITLE 17

DAMAGES AND RELIEF

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CHAPTER 1

RELIEF IN GENERAL

Section 17-101. Species of relief.
17-102. Relief in case of forfeiture.

17-101. (8657) Species of relief. As a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this part of the code.

History: En. Sec. 4260, Civ. C. 1895; re-en. Sec. 6038, Rev C. 1907; re-en. Sec. 8657, R. C. M. 1921. Cal. Civ. Sec. 3274.

NOTE .- The part of the code referred to in this section is contained in Title 17.

Unlicensed Photographers

The taking of photographs, either by licensed or unlicensed photographers, not being a nuisance, an injunction could not be had to prevent the activities of unlicensed photographers. Montana State Board of Examiners v. Keller, 120 M 364, 185 P 2d 503, 506.

References

Clifton v. Willson, 47 M 305, 310, 132 P 424; Burles v. Oregon Short Line R. Co., 49 M 129, 131, 140 P 513.

Collateral References

Action = 16. 1 C.J.S. Actions § 3.

17-102. (8658) Relief in case of forfeiture. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.

History: En. Sec. 4261, Civ. C. 1895; re-en. Sec. 6039, Rev. C. 1907; re-en. Sec. 8658, R. C. M. 1921. Cal. Civ. C. Sec. 3275.

Application of Section

This section was inapplicable where

option to purchase did not create an obligation on part of holder of option, and option had been terminated at time of commencement of action involving option. Northern Min. Corp. v. Cooke Min. Co., 123 F 2d 9, 13.

Down Payment

Where a \$500 down payment was made on the purchase of land and the balance of \$700 was to be paid under the terms of an escrow agreement by a specified date and purchaser failed to pay balance by such date, after which seller sold to another, such first purchaser was entitled to the return of the \$500 down payment. Herman v. Herman, 123 M 39, 207 P 2d 1155, 1157.

Essential Allegations

This section is based upon the principle that he who seeks equity must do, or offer to do, equity; and to obtain relief he must, by his allegations and proof, bring himself within its purview. Clifton v. Willson, 47 M 305, 310, 132 P 424. See Donlan v. Arnold, 48 M 416, 422, 138 P 775.

The party who invokes the protection of this section must set forth facts that will appeal to the conscience of a court of equity. Fratt v. Daniels-Jones Co., 47 M 487, 499, 133 P 700; Donlan v. Arnold, 48 M 416, 422, 138 P 775.

Where a purchaser of property seeks to avoid forfeiture of an advance payment incurred by reason of his failure to complete his contract, he must, under this section, allege and prove that his default was not the result of his grossly negligent, willful or fraudulent breach of duty, failure to do so which deprives him of the right to invoke the rule on appeal. Ellinghouse v. Hansen Packing Co., 66 M 444, 448, 213 P 1087.

In an action involving rights of parties to written contract for sale of property where defendants sought to rescind contract, if the defendants could make out a case under this section, they should be permitted to do so and ought not to forfeit all of the money which they paid. To prevail on this ground they were required to allege and prove a case following within the terms of the statute. Joy v. Little, 134 M 82, 328 P 2d 636, 639, 641.

Right to Relief

In action to prohibit defendant from canceling an agreement for sale of lands even though the deposit in court might be legally insufficient as a tender to defendant, plaintiff might be relieved from forfeiture upon a showing of facts sufficient to appeal to the conscience of a court of equity. Blackfeet Tribe of the Blackfeet Indian Reservation v. Klies Livestock Co., 160 F Supp 131, 133, 141.

Tax Liens

Any federal tax lien on property, which accrues because of the vendee's delinquency, attaches to the amount of unjust enrichment, if the mortgagee's claim is prior

in right. Greenup v. United States, 239 F Supp 330.

Unjust Enrichment

Under this section, where there is a forfeiture, the vendee has a cause of action against the vendor for unjust enrichment. Greenup v. United States, 239 F Supp 330.

When Relief Is Improper

Where a vendor retains the legal title to property sold to a purchaser, who defaults in meeting deferred payments, and an action is brought to enforce a forfeiture caused by such default, sections 45-112 and 45-1101 are not pertinent nor applicable; there is no lien; and, therefore, there is no basis for denying a forfeiture of the contract of sale. Cook-Reynolds Co. v. Chipman, 47 M 289, 298, 133 P 694.

In an action against a corporation to enforce the immediate forfeiture of a contract of purchase for the vendee's failure to make any deferred payment, the corporation is not entitled to any relief on the ground that its officers were so engrossed with other business that they forgot that a payment was due on the contract, especially where time has been made of the essence of the contract. Fratt v. Daniels-Jones Co., 47 M 487, 500, 133 P 700.

Plaintiff held not entitled to relief under the facts of the case. Donlan v. Arnold, 48 M 416, 422, 138 P 775.

Where a purchaser has failed to make payments, according to the terms of his contract, but has made some partial payments, before his breach of the contract, he cannot, ordinarily, recover the payments made before the breach, nor can he, under any circumstances, recover them without alleging and proving that the default was not the result of his "grossly negligent, willful, or fraudulent breach of duty." Suburban Homes Co. v. North, 50 M 108, 115, 145 P 2.

A defaulting purchaser of land under a contract which made time of the essence of it and under which the vendor exercised his option to declare it ended upon breach, who had made no down payment and had paid only the first year's interest during his two years' possession, was not entitled to recover back what he had expended on the premises, under this section, providing when a party incurring a forfeiture may be relieved therefrom. Edwards v. Muri, 73 M 339, 348, 237 P 209.

To entitle a defaulting purchaser to relief from forfeiture under the provisions of this section, he must set forth facts which will appeal to the conscience of a court of equity; hence a complaint intermingling allegations appropriate to an action for rescission of contract and one for

breach of it, was properly held insufficient as one for relief from a forfeiture, for failure to allege willingness by plain-tiff to do equity even by payment of rent for seven years of occupancy of farm lands, he on the contrary demanding recovery of the whole amount paid defendant, including taxes paid during that time. Friedrichsen v. Cobb, 84 M 238, 248, 275 P 267.

While courts are reluctant to enforce forfeitures and conditions involving them must be strictly interpreted against the party for whose benefit they are created, where a purchaser of farm land, under a contract which made time of its essence and provided that in case of default in the payments stipulated for, the purchaser should forfeit his right to possession and all payments made as liquidated damages, remained in possession for ten years without any complaint, and then finding himself unable by reason of conditions beyond his control to meet the final payment, no-tified the vendor of his inability to make payment and of his desire to surrender the land, whereupon the contract was de-clared forfeited, his complaint in his action to be relieved of the forfeiture, asking recovery of the difference between the payments made by him under the contract, with taxes, insurance, cost of improve-ments made by him, etc., and the value of the rental of the property, held insufficient to state facts which appeal to the conscience of a court of equity and therefore insufficient to state a cause of action under this section. Estabrook v. Sonstelie, 86 M 435, 439, 284 P 147.

Where, in an action for the cancellation of a land contract for breach of its conditions by the vendee the vendor does not seek a judgment of forfeiture, but waives any claim to damages and prays only for possession, after default and notice giving ample opportunity to repair the default as provided in the contract, the provision of this section, that where a party incurs a forfeiture by reason of his failure to comply with the provisions of his contract he may be relieved therefrom upon making full compensation to the other party, has no application. Huffine v. Lincoln, 87 M 267, 281, 287 P 629.

Conditional buyers were not entitled to relief from forfeiture of conditional sales contract because of their inability to make payments required by contract due to a wide-spread strike. Kovacich v. Metals Bank & Trust Co., 139 M 449, 365 P 2d 639, 640.

When Relief Is Proper

A party may be relieved from a forfeiture under this section upon a showing that he is equitably entitled to such relief, if his breach of duty was not grossly negligent, willful, or fraudulent. Cook-Reynolds Co. v. Chipman, 47 M 289, 302, 133 P 694; Fratt v. Daniels-Jones Co., 47 M 487, 500, 133 P 700.

One who, after making advance payments on a contract of sale of personalty, refuses to complete the transaction, the seller being ready and willing to fulfill its stipulations, cannot recover them back, unless he can bring himself within the exception provided by this section, by alleging and proving facts and circumstances upon which, in equity and good conscience, he should have relief from the forfeiture, and which excuse him from the imputation of gross negligence, or willful or fraudulent breach of duty. Clifton v. Willson, 47 M 305, 311, 132 P 424. See Donlan v. Arnold, 48 M 416, 422, 138 P

Notwithstanding the provision in a contract of sale of ranch land that on default of deferred payments all prior payments should be deemed forfeited as rental, the party in default may obtain relief from forfeiture if not guilty of gressly negligent, willful or fraudulent breach of duty, on presentation of such grounds therefor as appeal to the conscience of a court of equity. Fontaine v. Lyng, 61 M 590, 598, 202 P 1112.

Under this section, a person may be relieved against a forfeiture in any case where he sets forth facts which appeal to the conscience of a court of equity. Estabrook v. Sonstelie, 86 M 435, 439, 284 P 147; Greenup v. United States, 239 F

Supp 330.

Where, in an action in ejectment by the vendors of a tract of land against the vendee for refusal to complete the contract of purchase, the questions raised by the latter regarding the title offered were fairly debatable, but found not meritorious, and the time for making final payment had then expired, the case was one justifying application of the rule for relief against forfeiture under this section. Williams v. Hefner, 89 M 361, 380, 297 P 492.

Where a purchaser of realty on deferred payments relied on a supposed breach of a contract of sale by the vendor, based on a fairly debatable point, and mistakenly refused to make further payments, in an action by the vendor to terminate the contract with forfeiture of payments, equity properly relieved purchaser from such forfeiture. Huston v. Vollenweider, 101 M 156, 163, 53 P 2d 112.

Where the vendee of county-owned property was in default in payments on principal and taxes under his contract of purchase dated November 1934, making time of its essence, the county, in 1940, after notice and declaration of forfeiture, brought suit to quiet title, in view of

defendant's tender of the full amount of delinquent payments, interest and taxes at the trial, and of the difficulty for the average person to make loans due to ecoaverage person to make loans due to economic conditions, and in the absence of circumstances which would have rendered relief inequitable, the trial court erred in denying relief from forfeiture under this section. Yellowstone County v. Wight, 115 M 411, 416, 145 P 2d 516.

To come within the provisions of this section a party must set forth facts of a forfeiture which will appeal to the con-

forfeiture which will appeal to the conscience of a court of equity. Kovacich v. Metals Bank & Trust Co., 139 M 449,

365 P 2d 639, 640.

Where vendor brought action to recover possession of realty and the notice of forfeiture was ambigious and attempted to accelerate payment to an amount almost twice that which could be rightfully de-manded and the total amount of the forfeiture was twice the rental value of the property, the vendor's notice did not terminate the vendee's rights under the contract and the district court should have granted vendee's motion to dismiss under Rule 41(b), M. R. Civ. P. Shuey v. Hamilton, 142 M 83, 381 P 2d 482.

Under a lease arrangement whereby the tenant agreed to pay a percentage of the sales over \$270,000, in addition to a stipulated monthly rent, and the lease provided for a forfeiture in the event of a breach, the court could give relief against forfeiture under this special statute upon the tenant making full compensation where the forfeiture was claimed on the fact that the tenant did not pay a percentage of the sales of farm implements which were kept in a separate building, although all the sales were made and money received at the leased premises and a controversy arose as to whether such sales should be included in that amount upon which a percentage was paid as rent. Gamble-Skogmo Inc. v. McNair Realty Co., 98 F Supp 440, 444, affirmed in 193 F 2d 876.

Willful Breach

This section explicitly points out that if the breach is willful there will be no relief from forfeiture and no common-law principle can override this exacting statutory provision. Joy v. Little, 138 M 110, 354 P 2d 1035, 1041.

References

Dietz v. Rabe, 65 M 500, 211 P 343; Nangle v. Northern Pacific Ry. Co., 96 M 512, 521, 32 P 2d 11; Lewis v. Peterson, 127 M 474, 267 P 2d 127, 128.

Collateral References

Contracts 318. 17A C.J.S. Contracts § 473.

CHAPTER 2

COMPENSATORY RELIEF-DAMAGES-INTEREST-EXEMPLARY DAMAGES

Section 17-201. Person suffering detriment may recover damages.

17-202. Detriment defined.

17-203. Injuries resulting or probable after suit brought.

17-204. Person entitled to recover damages may recover interest thereon.

17-205. In actions other than contract.

Limit of rate by contract. 17-206.

Acceptance of principal waives claim to interest.

Exemplary damages-in what cases allowed. 17-208.

17-201. (8659) Person suffering detriment may recover damages. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.

History: En. Sec. 4270, Civ. C. 1895; re-en. Sec. 6040, Rev. C. 1907; re-en. Sec. 8659, R. C. M. 1921. Cal. Civ. C. Sec. 3281. Field Civ. C. Sec. 1832.

Amount and Extent of Damage Must Be Proved

Under this section, one injured through the unlawful act of another may recover compensation by way of damages which directly flow from the act of the person causing them; but to justify such recovery there must be proof of the extent and amount of the damages claimed. Recovery is limited to the amount pleaded. A car owner, deprived of it unlawfully, is entitled to the value of its use less de-preciation if he desired to use it; if he wanted to sell it, depreciation by age is the proper measure of damages. Rigney v. Swingley, 112 M 104, 110, 113 P 2d 344.

Application of Section

Any person who suffers detriment by reason of another's failure to perform an act imposed by law may recover damages. Conway v. Monidah Trust, 47 M 269, 279, 132 P 26.

Under this section, and sections 92-201, 93-2810 and 93-2824, the widow of an employee insured under plan 3 of the Workmen's Compensation Act and killed in the performance of his duties, after being awarded compensation under the facts stated, had the right, as heir and administratrix, to bring a negligence action against the driver of the car which killed her husband and employ an attorney to conduct the case, the latter being given a first lien upon his client's cause of action by section 93-2120, which cannot be affected by any settlement between the parties before or after judgment. Hardware Mutual Casualty Co. v. Butler, 116 M 73, 80, 148 P 2d 563.

Automobile Accident

In an action for damages to an automobile, it was not a condition precedent to recovery that the plaintiff should have first incurred an indebtedness or that he should actually have paid the sum claimed for the repairs. Hoenstine v. Rose, 131 M 557, 312 P 2d 514, 517.

Breach of Contract

Where a stranger to a contract without justification induces a party thereto to break it, he is responsible in damages to the other party to it. Simonsen v. Barth, 64 M 95, 100, 208 P 938; Burden v. Elling State Bank, 76 M 24, 30, 245 P 958, 46 ALR 906.

Lump-sum Damages, Apportionment Unauthorized

In the absence of statute authorizing a jury to apportion compensatory damages against joint tort-feasors, damages must be assessed in one sum against those found liable; but where the jury in its verdict finds a lump sum and then attempts to divide it among certain of the defendants, the division should be stricken out as surplusage and judgment entered for the lump sum, or the verdict should be sent back to the jury with instruction to correct it. The jury may apportion exemplary damages between joint tort-feasors if actual damages have been assessed. Bowman v. Lewis, 110 M 435, 438, 102 P 2d 1, overruled on another point in 123 M 228, 239, 211 P 2d 420.

Malicious Prosecution

In action for malicious prosecution where jury finds for plaintiff, he is entitled to damages. Fauver v. Wilkoske, 123 M 228, 211 P 2d 420, 423, 17 ALR 2d 518.

Measure of Damages

The measure of damages for wrongfully procuring the appointment of a receiver

for a going and solvent corporation is the amount which will afford compensation for the detriment proximately caused by defendants' wrongful act, which, in case of the wrongful conversion of personal property, is presumed to be the value of the property at the time of conversion, with interest from that time, or the highest market value of the property at any time between conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in pursuit of the property. Thornton-Thomas Mercantile Co. v. Bretherton, 32 M 80, 98, 80 P 10.

It is not the theory of our code, as evidenced by this section, and sections 17-202, 17-401 and 17-404, that substantial damage suffered by one through the fault of another shall be unredressed, but that in all such cases the damaged party shall have full compensation. Chesnut v. Sales, 49 M 318, 324, 141 P 986.

Removal of Action to Federal Court

In action against foreign corporation and its resident employee, who was joined as John Doe, was not served with process and did not appear, for injuries sustained by customer who tripped over orange crate which had been allegedly placed in aisle of corporation's store by employee, the test for removal of cause to federal court on diversity of citizenship was whether employee had any real connection with controversy; a resident citizen, properly joined, is not merely a nominal party who can be ignored because not served or has not appeared; held, that corporation not entitled to have action removed on ground of diversity of citizenship. Jensen v. Safeway Stores, Inc., 24 F Supp 585.

Rental Value

Fact that plaintiff had closed its gasoline filling station entirely because of lack of business prior to its occupancy by defendant would not prove that the property had no rental value. Pritchard Petroleum Co. v. Farmers Co-op. Oil & Supply Co., 121 M 1, 190 P 2d 55, 59.

Value of the Use

The value of the use is the value to the owner of the property, not the value to the wrongdoer. Pritchard Petroleum Co. v. Farmers Co-op. Oil & Supply Co., 121 M 1, 190 P 2d 55, 58.

The value of the use is ordinarily held to be the reasonable rental value of the premises withheld. Pritchard Petroleum Co. v. Farmers Co-op. Oil & Supply Co., 121 M 1, 190 P 2d 55, 58.

In action to recover the value of the use and occupancy of a tract of land which had been used as a filling station it was proper to sustain objection to testi-

mony as to the value of the use of land with respect to each gallon of gasoline and each pound of grease sold, since it is not the withholder's gain but the rental value that measures the compensation. Pritch-ard Petroleum Co. v. Farmers Co-op. Oil & Supply Co., 121 M 1, 190 P 2d 55, 59.

Value of Vehicle

Where plaintiff showed the value of damaged vehicle plus the cost of repairs and defendant failed to overcome the preponderance of evidence by showing truck's value by comparable and available units, the measure of damages was determined by plaintiff's evidence and not by the blue book list value. Favero v. Culhane, 142 M 69, 381 P 2d 487.

References

Freund v. Murray, 39 M 539, 553, 104 P 683; Clifton v. Willson, 47 M 305, 310, 132 P 424; Griffin v. Chicago, M & St. P. Ry. Co., 67 M 386, 392, 216 P 765; Tucker v. Missoula Light & Ry. Co., 77 M 91, V. Missolia Hight & Ry. Co., 17 In 31, 98, 250 P 11; Galbreath v. Armstrong, 121 M 387, 193 P 2d 630, 633; Welsh v. Roehm, 125 M 517, 241 P 2d 816, 819; Hursh v. Mon-O-Co. Oil Corp., 139 M 302, 363 P 2d 485, 487.

Collateral References

Action 13; Damages 1. 1 C.J.S. Actions § 3; 25 C.J.S. Damages § 1.

22 Am. Jur. 2d 26, Damages, § 11.

Damages for diminution of value of use of property as recoverable for a permanent nuisance affecting real property. 10 ALR 2d 669.

Arrest under warrant, mitigation of damages in action for false imprison-ment based on mistake as to identity of person arrested. 10 ALR 2d 756.

Loss of profits of a business in which plaintiff is interested as a factor in determining damages for impairment of earning capacity in action for personal injuries. 12 ALR 2d 288.

Changes in cost of living or in purchasing power of money as affecting damages for personal injuries or death. 12 ALR 2d 611.

Hospitalization or medical insurance as affecting damages recoverable for injury or death. 13 ALR 2d 355.

Measure and elements of damages for

17-202. in person or property.

History: En. Sec. 4271, Civ. C. 1895; re-en. Sec. 6041, Rev. C. 1907; re-en. Sec. 8660, R. C. M. 1921. Cal. Civ. C. Sec. 3282. Field Civ. C. Sec. 1833.

personal injury resulting in death of infant. 14 ALR 2d 485.

Elements and measure of damages for procuring breach of contract. 26 ALR 2d

Recovery from mental shock or distress in connection with injury or interference with tangible property. 28 ALR 2d 1070.

Damages in action by insured against insurance broker or agent in respect to procurement, continuance, terms, in coverage of insurance policies. 29 ALR 2d 203.

Damages for violation of re-employment rights of discharged servicemen. 29 ALR 2d 1335.

Exemplary damages in action for tenant's failure to surrender possession of rented premises. 32 ALR 2d 611.

Pain and suffering of parent on account of personal injury to infant as recoverable item of damages. 32 ALR 2d 1078.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty. 33 ALR 2d 511.

Measure of damages for loss of or interference with lateral support. 36 ALR 2d

1253.

Cost of hiring substitute or assistant during incapacity of injured party as proof of damages for loss of time in action for personal injury, 37 ALR 2d 370.

Damages recoverable from insured for failure or delay in making payments due under contract. 37 ALR 2d 538. Damages to land as affected by per-

manence of nuisance in operation of sewage disposal plant. 40 ALR 2d 1200.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action. 63 ALR 2d 1393.
Right to recover attorneys' fees for wrongful attachment. 65 ALR 2d 1426.

Measure of evicted tenant's recovery for

improvements made by him on premises for lease uses. 71 ALR 2d 1104. Measure and elements of damages, in action other than one against a carrier for injury, loss, or destruction of livestock. 79 ALR 2d 677.

Mitigation of damages in landlord's action for waste against tenant. 82 ALR 2d 1117.

Measure of damages for wrongful removal of earth, sand, or gravel from land. 1 ALR 3d 801.

Overhead expense as recoverable element of damages. 3 ALR 3d 689.

(8660) Detriment defined. Detriment is a loss or harm suffered

References

Clifton v. Willson, 47 M 305, 310, 132 P 424; Chesnut v. Sales, 49 M 318, 324, 141 P 986; Hoenstine v. Rose, 131 M 557, 312 P 2d 514, 517; Hursh v. Mon-O-Co. Oil Corp., 139 M 302, 363 P 2d 485, 487. Collateral References

Damages \$4. 25 C. J. S. Damages § 6.

17-203. (8661) Injuries resulting or probable after suit brought. Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.

History: En. Sec. 4272, Civ. C. 1895; re-en. Sec. 6042, Rev. C. 1907; re-en. Sec. 8661, R. C. M. 1921, Cal. Civ. C. Sec. 3283. Field Civ. C. Sec. 1834.

Application of Section

Under this section proof of damages may extend to all facts which occur and grow out of the injury after the commencement of the action and up to the date of trial. Kornec v. Mike Horse Min. & Mill. Co., 120 M 1, 180 P 2d 252, 260.

Assault and Battery

In action for assault and battery if injury to eye and ear developed after the commencement of the action, evidence

as to such injuries was admissible. Kornec v. Mike Horse Min. & Mill. Co., 120 M 1, 180 P 2d 252, 260.

Collateral References

Damages \$\infty 26, 225.

25 C.J.S. Damages § 29; 25A C.J.S. Damages § 193.

Recovery by contractor or artisan, suing for breach of warranty, of damages for loss of future profits occasioned by use in his business of unfit materials. 28 ALR 2d 591.

What items of damages on account of personal injury to infant belong to him and what to parent. 32 ALR 2d 1060.

17-204. (8662) Person entitled to recover damages may recover interest thereon. Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

History: En. Sec. 4280, Civ. C. 1895; re-en. Sec. 6043, Rev. C. 1907; re-en. Sec. 8662, R. C. M. 1921. Cal. Civ. C. Sec. 3287. Field Civ. C. Sec. 1835.

Allowed from Date of Court Decision

Where a mechanics' lien claimant considerably overstated the amount of his claim in the lien filed, so that it required the judgment of the court in an action to foreclose the lien to decide the correct amount due, interest—a creature of statute—was allowable only from the date of the decision, and the court in allowing it from the date of the completion of the work committed error. Eskestrand v. Wunder, 94 M 57, 66, 20 P 2d 622, distinguished in 108 M 56, 66, 90 P 2d 489.

Where school district, contrary to an appraisal clause in insurance contract, brought suit to determine amount of damage caused by fire to an abandoned school, even though judgment overruled and subsequent appraisal ordered, interest on any amount later determined was to begin from the time a definite amount had been fixed by the jury. School District No. 1 v. Globe Republic Ins. Co., 146 M 208, 404 P 2d 889.

Bankruptcy Claim

Where materialmen included items in their claim against surety in bankruptcy

proceedings to which they were not entitled, interest could only be allowed from the time the court ascertained the exact amount of the claim. United States for Use and Benefit of Chemetron Corp. v. George A. Fuller Co., 250 F Supp 649.

Conversion

This section does not alter the statutory damages for conversion as prescribed by section 17-404. Galbreath v. Armstrong, 121 M 387, 193 P 2d 630, 633.

Mechanic's and Materialman's Liens, after Judgment

A materialman, who secured judgment for the enforcement of his lien, was entitled to interest under this section on the entire amount thereof notwithstanding he had overstated the amount, where the correct amount was readily ascertainable by consulting the owner, and there was no offer of payment so as to stop the running of interest under sections 58-423 and 58-427. Federal Land Bank of Spokane y. Green, 108 M 56, 66, 90 P 2d 489, explained in 250 F Supp 649, 664.

No Demand Necessary when Debtor Knows His Obligations

When a debtor knows what he is to pay, and when he is to pay it, no demand is necessary to start the running of interest from the date the payment should have been made. W. J. Lake & Co. v. Montana Horse Products Co., 109 M 434, 443, 97 P

When Court May Add Interest to Judg-

Where plaintiff (in an action for breach of contract) is entitled to interest under statutory authority as a legal incident to his claim and he asks for interest in his complaint, and his claim is one which is certain or capable of being made certain by calculation, then the court may add the interest to the judgment when there is no controversy on the facts giving rise to the right to interest which should have been, but was not, submitted to the jury. W. J. Lake & Co. v. Montana Horse Products Co., 109 M 434, 441, 97 P 2d 590.

When Interest Shall Be Allowed

This section authorizes a recovery of interest on an open account from demand, and the institution of a suit on an open account for goods sold is a demand. Hefferlin v. Karlman, 29 M 139, 147, 148, 74 P 201. See also Clifton, Applegate & Toole v. Big Lake Drain Dist. No. 1, 82 M 312, 335, 267 P 207.

Where plaintiff gave defendant an option to buy a mine, but, before the payment agreed upon became due, denied the existence of the contract and sued to recover the property, he was not entitled to interest on the purchase money, on specific performance being decreed against him, for the reason that he himself prevented defendant from making the payments. Finlen v. Heinze, 32 M 354, 390, 80 P 918, overruled as to interest in 139 M 308, 316, 362 P 2d 1014.

Interest on a balance due a physician for medical services seems to be properly allowable, under this section, in an action to recover such balance. Leggat v. Gerrick, 35 M 91, 95, 88 P 788.

Interest was properly allowed on the

amount awarded an employee, suing for services rendered under an oral agreement. Albertini v. Linden, 45 M 398, 400, 123 P 400.

If a person with money in a bank, part of which is subject to check, the remainder being shown by a passbook, is indebted on a note to the bank in excess of the amount of such money, the effect of the suspension and declared insolvency of the bank is to make the deposits due and actionable; the depositor is, therefore, entitled to interest on the deposits from the time that the bank's doors were closed until the date of the judgment on the note. Williams v. Johnson, 50 M 7, 21, 144 P 768.

Where a creditor of an insolvent bank is forced to bring suit to enforce the statutory liability of a stockholder he is entitled to interest on his claim from the time of the commencement of the action. even though the interest, when added to the principal, exceeds the amount of the liability fixed by the statute. Mitchell v. Banking Corp. of Montana, 94 M 165, 177, 22 P 2d 175.

As respects liability of contractor's surety, subcontractors were entitled to interest from date of completion of services rendered under fixed price contract. American Surety Co. of New York v. Cove Irr. Dist., 54 F 2d 197.

Subcontractors held not entitled to interest on quantum meruit claim from principal contractor or its surety before judgment determining such claim. American Surety Co. of New York v. Cove Irr. Dist., 54 F 2d 197.

References

McGrath v. Dubs, 127 M 101, 257 P 2d 899, 906.

Collateral References

Damages 66-69; Interest 19, 39 (1-3). 25 C.J.S. Damages §§ 51-54; 47 C.J.S. Interest § 19.

22 Am. Jur. 2d 256, Damages, § 179.

History: En. Sec. 4281, Civ. C. 1895; re-en. Sec. 6044, Rev. C. 1907; re-en. Sec. 8663, R. C. M. 1921. Cal. Civ. C. Sec. 3288. Field Civ. C. Sec. 1836.

Application of Section

This section, authorizing the jury "in an action for the breach of an obligation not arising from contract," and in certain others, to award interest in their verdict, while applicable in actions for the destruction of property, has no application to

17-205. (8663) In actions other than contract. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the

> personal injury actions. Daly v. Swift & Co., 90 M 52, 66, 68, 300 P 265.

Assignable Interest

The right to recover damages for the negligent destruction of property by fire, together with interest recoverable in the discretion of the jury under this section, is assignable, and passes by subrogation to an insurance company to the extent of the proportion of the loss paid by it to the owner of the property destroyed. Caledonia Ins. Co. v. Northern Pacific Ry. Co., 32 M 46, 48, 79 P 544, distinguished in 75 F Supp 850, 852. See Gaugler v. Chicago, Milwaukee & Puget Sound Ry. Co., 197 Fed 79, 83.

Federal Employers' Liability Act

Interest was not allowable on recovery in personal injury action under Federal Employers' Liability Act (45 U.S.C., §§ 51-59) this section not being controlling. Chicago, M., St. P. & P. R. Co. v. Busby, 41 F 2d 617.

Jury Must Be Instructed on Interest

While, under this section, interest may be allowed in an action for damages to livestock shipments due to the carriers' negligence, the jury should be instructed that the question of interest is left to their discretion, and refusal to so instruct is error. Phelps v. Great Northern Ry. Co., 66 M 198, 220, 213 P 610, reversed on other grounds in 271 U S 99, 70 L Ed 954, 46 S Ct 439.

Livestock Killed by Railroad

In an action against a railroad company for the value of livestock killed on the track, the plaintiff, if successful, has a statutory right to interest. Dewell v. Northern Pacific Ry. Co., 54 M 350, 359, 170 P 753.

Property Injured by Grading Street

In an action for damages against a city caused to plaintiff's property by the grading of a street, the jury may, in their discretion, allow interest on the amount awarded from the time of the completion

of the work, under this section. Wright v. City of Butte, 64 M 362, 372, 210 P 78.

Recovery of Unlawful Tax

Chapter 142, Laws of 1925, (84-4502 and 84-4503) providing inter alia that when taxes paid under protest may be recovered, recovery shall be had without interest, has no application to an action based on section 84-4176, authorizing refund of a tax "paid more than once," but that in such an action plaintiff is entitled to interest on the unlawful tax from the date of payment, even though plaintiff, to avoid the imputation that the payment made was voluntary, made it under protest. Williams v. Harvey, 91 M 168, 173, 6 P 2d 418.

Wrongful Death

Under this section, providing that in an action for the breach of an obligation not arising from contract, interest may be awarded in the discretion of the jury, interest may be allowed on amount awarded in an action for death caused by the negligence, especially where the damages awarded do not include compensation for suffering extending for an indefinite period after the injury, but the time of the accrual of the right is fixed by death from which date interest may run. Burns v. Eminger, 84 M 397, 410, 276 P 437, distinguished in 93 M 72, 86, 17 P 2d 93.

Collateral References

Damages \$\infty\$ 66, 67, 69. 25 C.J.S. Damages \$\\$ 53, 54.

17-206. (8664) Limit of rate by contract. Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.

History: En. Sec. 4282, Civ. C. 1895; re-en. Sec. 6045, Rev. C. 1907; re-en. Sec. 8664, R. C. M. 1921. Cal. Civ. C. Sec. 3289. Field Civ. C. Sec. 1837.

Cross-Reference

Maximum rate of interest by agreement, sec. 47-125.

Collateral References

Interest © 68. 47 C.J.S. Interest § 52.

17-207. (8665) Acceptance of principal waives claim to interest. Accepting payment of the whole principal, as such, waives all claim to interest.

History: En. Sec. 4283, Civ. C. 1895; re-en. Sec. 6046, Rev. C. 1907; re-en. Sec. 8665, R. C. M. 1921. Cal. Civ. C. Sec. 3290. Field Civ. C. Sec. 1838.

Application of Section

This section has no application to moneys deposited to indemnify sureties on a bond against loss. Leggat v. Palmer, 39 M 302, 309, 102 P 327.

Collateral References

Interest 26; Payment 22 (7). 47 C.J.S. Interest § 29; 70 C.J.S. Payment § 143.

17-208. (8666) Exemplary damages—in what cases allowed. In any action for a breach of an obligation not arising from contract, where the

defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

History: En. Sec. 4290, Civ. C. 1895; re-en. Sec. 6047, Rev. C. 1907; re-en. Sec. 8666, R. C. M. 1921. Cal. Civ. C. Sec. 3294. Field Civ. C. Sec. 1839.

Apportionment between Joint Tort-feasors

The jury may properly apportion exemplary damages among joint tort-feasors in a conversion action, but before a finding of such damages may be made, actual damages must have been assessed, and where exemplary damages only were assessed against one of the defendants, reversal of the judgment carries with it the award of costs against such defendants. Bowman v. Lewis, 110 M 435, 438, 102 P 2d 1, overruled on another point in 123 M 228, 239, 211 P 2d 420.

Assault and Battery—Malice, Test for Damages

In an assault case where malice is alleged it is not the quantum of force used but whether the assailant was in a malicious state of mind which is the test in awarding exemplary damages; the use of a dangerous weapon (a hammer) is some evidence of a wanton disregard of human life and generally gives rise to such damages; the question of malice is generally one for the jury. Vaughn v. Mesch, 107 M 498, 508, 87 P 2d 177, 123 ALR 1106.

Breach of Contract

Plaintiff was not entitled to exemplary damages in action for allegedly fraudulent representations by defendant's insurance adjuster inducing execution of a contract of release by the plaintiff. Westfall v. Motors Ins. Corp., 140 M 564, 374 P 2d 96, 99.

Punitive damages could not be allowed on a contract between laundromat owner and company that sold washing machines and dryers, where laundromat owner relied on the contract, rather than on prior oral promises, to help install the machines, in his cause of action. Ryan v. Ald, Inc., 146 M 299, 406 P 2d 373.

Under this section an insurer is not liable for exemplary damages for willful or fraudulent breaches of contract. Wade v. Great American Ins. Co., 255 F Supp 735, 736.

Exemplary Damages Not Recoverable unless There Is Actual Damage

Before exemplary damages may be awarded, actual damages must first be found to have been suffered. Gilham v. Devereaux, 67 M 75, 78, 214 P 606, 33 ALR 381, overruled on another point in 123 M 228, 239, 211 P 2d 420.

In a husband's action for damages for alienation of affections, where the jury expressly found that plaintiff had not suffered any actual damages, an award of \$2,000 exemplary damages was unwarranted. Gilham v. Devereaux, 67 M 75, 78, 214 P 606, 33 ALR 381, distinguished in 68 M 85, 90, 217 P 667, overruled on another point in 123 M 228, 239, 211 P 24 420.

Exemplary Damages Should Be Separately Stated

Where in an action in claim and delivery exemplary damages were not authorized upon any theory, and the jury allowed \$500 damages in a lump sum without designating what part was intended as actual and what part as punitive damages, the cause will be remanded for a new trial, it being impossible to determine from the verdict the amount intended to be allowed as damages by way of punishment. Luther v. Lee, 62 M 174, 204 P 365.

Inadmissibility of Oral Statements

Since punitive damages cannot be awarded on obligations arising out of contract, evidence outside the agreement, which attempts to prove a basis for such damages, is inadmissible as falling within the parol evidence rule. Ryan v. Ald, Inc., 146 M 299, 406 P 2d 373.

Malice Actual or Presumed

In an action in conversion in which exemplary damages were asked, an instruction defining the terms "actual" and "presumed" malice, was not open to the objection that it authorized an award of punitive damages for malice in law as well as malice in fact. Wray v. Great Falls Paper Co., 72 M 461, 465, 234 P 486.

Malice in Law

"Malice in law" justifying an award of exemplary damages will be implied where defendant's conduct is unjustifiable. Evidence that overtaking automobile without warning, during severe snowstorm, seeking to pass, and in so doing, sideswiping automobile in which accident victim rode would warrant finding that conduct of driver of overtaking automobile was unjustifiable, authorizing an implication of malice, as basis for an award of exemplary damages. Cherry-Burrell Co. v. Ray C. Thatcher, 107 F 2d 65, 69.

Matters for Jury To Consider in Assessing

In assessing exemplary damages the jury should take into consideration all the cir-

cumstances surrounding the act complained of and may consider the wealth and pecuniary ability of defendant, the matter of fixing the amount resting largely in its discretion. Johnson v. Horn, 86 M

314, 318, 283 P 427.

The rule that where exemplary damages are sought, the jury may take into consideration the pecuniary ability of defendant to pay, as shown by the evidence applies in an action against joint tort-feasors; in such a case the jury may make awards of such damages in different amounts according to the various degrees of culpability of each defendant, keeping in mind the financial condition of each. Edquest v. Tripp & Dragstedt Co., 93 M 446, 456, 19 P 2d 637.

Necessity for Actual Damages

Where actual damage is shown although the extent of the damage cannot be shown in money value, exemplary damages may be awarded. Fauver v. Wilkoske, 123 M 228, 211 P 2d 420, 426, 17 ALR 2d 518, overruling Gilham v. Devereaux, 67 M 75, 214 P 606, 33 ALR 381; Truzzolino Food Products Co. v. F. W. Woolworth Co., 108 M 408, 91 P 2d 415; Bowman v. Lewis, 110 M 435, 102 P 2d 1.

Necessity for Actual Damages-Verdict

In action for malicious prosecution where jury found malice verdict was valid where they gave exemplary damages but entered "none" in the space on the verdict for actual damages. Fauver v. Wilkoske, 123 M 228, 211 P 2d 420, 423, 17 ALR 2d 518.

Where actual damages appear from the evidence, an award of punitive or exemplary damages will stand, though the verdict of the jury shows no finding of actual damages. Brown v. Grenz, 127 M 49, 257 P 2d 246, 248.

Not Necessary To Claim Eo Nomine

To entitle plaintiff to recover punitive damages, in an action for malicious prosecution, in addition to those actually sustained, it is not necessary that he claim them eo nomine in his complaint. Martin v. Corscadden, 34 M 308, 323, 86 P 33.

In an action for damages for the fraudulent use of a trade-mark, complaint asking exemplary damages need not set them out eo nomine, but must allege that the acts of defendant were characterized by fraud, oppression, malice or the like, under this section. Truzzolino Food Products Co. v. F. W. Weolworth Co., 108 M 408, 420, 91 P 2d 415, overruled on another point in 123 M 228, 239, 211 P 2d 420.

Presumption That Actual Damages Found When Exemplary Damages Given When the jury was instructed by the court that it could allow exemplary damages if "you find by a preponderance of the evidence that plaintiff suffered actual damages," and the jury returned a verdict of actual damages "none" and exemplary damages "\$250," the presumption is that the jury found actual damages. The fact that they did not assess a money award for the actual damages is not controlling for there are various reasons why it did not assess a money award; an obvious one is the existence of a counterclaim by the defendant. Welsh v. Roehm, 125 M 517, 241 P 2d 816, 820.

When Exemplary Damages Not Recoverable

Where evidence was insufficient to justify an inference of malice, fraud, or oppression in either taking or detaining property in controversy, in an action in conversion, imposition of punitive damages, otherwise recoverable under this section, was unwarranted. De Celles v. Casey, 48 M 568, 575, 139 P 586.

Complaint in an action arising out of an automobile collision, alleging that defendant was driving at the rate of 40 miles an hour and on the wrong side of the road, was sufficient to sustain a charge of mere negligence, but insufficient to warrant recovery of exemplary damages. Thompson v. Shanley, 93 M 235, 245, 17 P 2d 1085, distinguished in 94 M 229, 235, 21 P 2d 1101.

The plaintiff is never entitled to exemplary damages as a matter of right, regardless of the situation or the sufficiency of the facts, and something more than mere negligence must be alleged and proved. Spackman v. Ralph M. Parsons Co., — M —, 414 P 2d 918.

When Recoverable

In an action against a railway company to recover damages for failure to stop its train at a station where it was scheduled to stop when flagged, punitive, in addition to compensatory, damages may be awarded if it is shown that the engineer saw the signal, but willfully refused to stop for the purpose of receiving plaintiff as a passenger. Burles v. Oregon Short Line R. Co., 49 M 129, 132, 140 P 513. See Jones v. Shannon, 55 M 225, 234, 175 P 882.

Where the element of fraud entered into the wrongdoing of a telegraph operator in withholding messages to and from a customer of his company, thus enabling him to profit by it, the provisions of this section, awarding the right to punitive damages, governed, and section 8-822 did not. Lahood v. Continental Tel. Co., 52 M 313, 322, 157 P 639.

To warrant the recovery of exemplary damages, defendant must have entertained

a guilty intent, the wrongful acts being characterized by circumstances of aggravation, malice, oppression and the like. Luther v. Lee, 62 M 174, 204 P 365.

To warrant the recovery of exemplary damages in a tort action the complaint must allege either that the act complained of was done maliciously, willfully or wantonly, or the facts surrounding its commission must be set forth with such particularity as that one or more of such elements may be inferred therefrom. Thompson v. Shanley, 93 M 235, 245, 17 P 2d 1085.

When Recoverable—Alienation of Affections

Punitive damages may be awarded in an action for the alienation of a husband's affections, even though the evidence furnishes no basis for a finding of malice, since malice may be implied from the conduct of defendant in causing the wrong complained of, its existence being a question for the jury. Moelleur v. Moelleur, 55 M 30, 34, 173 P 419.

When Recoverable—Conversion of Personal Property

The complaint in an action for damages for a conversion which alleged, among other things, that defendants "did unlawfully, maliciously, fraudulently, and oppressively take and carry away" the property in controversy, and refused restitution of the same after repeated demands, was broad enough to warrant inquiry into the motives and behavior of defendants, and to justify the giving of an instruction that exemplary damages might be awarded for oppressively, fraudulently, or maliciously withholding the chattels after demand. Shandy v. McDonald, 28 M 393, 401, 100 P 203.

In cases of conversion of personal property, the statute authorized the imposition of punitive damages, where the defendant acted maliciously, fraudulently, or oppresively, either in taking or detaining the property in controversy. De Celles v. Casey, 48 M 568, 575, 139 P 586.

Where the jury in an action in conversion found in favor of plaintiff's contention that defendant chattel mortgagee in violation of his agreement extending the time within which plaintiff could pay his debt caused an officer to seize the chattel, thus acting maliciously and oppressively, an award of exemplary damages was justified. Ramsbacher v. Hohman, 80 M 480, 488, 261 P 273.

When Recoverable-Eviction of Tenant

A hotel proprietor who wrongfully forces an entry into the room of a guest, and without just cause ejects him from it and the house, is liable not only for compensatory, but also exemplary damages, if the ejection is accompanied by circumstances indicating that it was prompted by malice, fraud, or a spirit of oppression. Jones v. Shannon, 55 M 225, 229, 175 P 882.

Evidence was sufficient in an action against the proprietor of a public house for the wrongful ejection of a guest, to show that such ejection, done by proprietor's agent, was actuated by a malicious motive. Jones v. Shannon, 55 M 225, 229, 175 P 882.

Where a landlord, in doing an act which constructively evicts the tenant, is motivated by a desire to vex, injure or annoy the tenant, the act is done maliciously and a jury may award punitive damages. Cruse v. Clawson, 137 M 439, 352 P 2d 989, 995.

When Recoverable—Malicious Prosecution

It is within the province of the jury to allow exemplary as well as compensatory damages in an action for malicious prosecution, and unless their determination appears to have been influenced by passion, prejudice or some other improper motive, or the amount is outrageously disproportionate to the wrong done or the situation or circumstances of the parties, the award will not generally be disturbed. Cornner v. Hamilton, 62 M 239, 245, 204 P 489.

When Recoverable-Trespass

Where acts constituting a trespass are shown to be wanton, malicious or oppressive and of such a character as to indicate a reckless disregard of the rights of the plaintiff, the jury in their discretion may award a reasonable amount as punitive damages in addition to compensatory damages. Mosback v. Smith Bros. Sheep Co., 65 M 42, 47, 50, 210 P 910.

When Recoverable-Wrongful Death

Damages by way of punishment, in addition to those actually sustained, may be recovered in an action against a mining company for the negligent and wrongful killing of plaintiff's intestate, a miner, where the complaint charges that the defendant company was primarily responsible for the death of decedent. Olsen v. Montana Ore Purchasing Co., 35 M 400, 412, 89 P 731.

When Supreme Court Will Interfere on Appeal

Unless an alleged excessive award of punitive damages appears to have been influenced by passion, prejudice or some improper motive, or is outrageously disproportionate either to the wrong done or the situation or circumstances of the parties, the supreme court will not generally

interfere; there is no established rule to be followed for ascertaining whether such an award is excessive. Johnson v. Horn, 86 M 314, 318, 283 P 427.

References

Freund v. Murray, 39 M 539, 553, 104 P 683; Winterscheid v. Reichle, 45 M 238, 242, 122 P 740; D'Autremont v. McDonald, 56 M 522, 526, 185 P 707.

Collateral References

Damages \$\sim 87-94.

25 C.J.S. Damages §§ 117-126. 22 Am. Jur. 2d 322, Damages, § 236.

Intoxication of automobile driver as basis for award of punitive damages. 3 ALR 2d 212.

Punitive damages for wrongful ejection or rejection of guest from hotel or restaurant. 14 ALR 2d 715.

Actual damages as a necessary predicate of punitive or exemplary damages. 17 ALR 2d 527.

Punitive damages in action against undertaker for acts or omissions relating to corpse. 17 ALR 2d 770.

Recovery of exemplary or punitive damages from municipal corporation. 19 ALR 2d 903.

damages for Exemplary procuring breach of contract. 26 ALR 2d 1274.

Punitive or exemplary damages in action by spouse for alienation of affections or criminal conversation. 31 ALR 2d 713.

Exemplary damages in action for ten-ant's failure to surrender possession of rented premises. 32 ALR 2d 611.

Exemplary damages on account of personal injury to infant as belonging to him or to parents. 32 ALR 2d 1079.

Relation of actual to exemplary damages for defamation. 35 ALR 2d 225.

Ratio of exemplary to actual damages for false imprisonment or arrest. 35 ALR 2d 278.

Extensiveness or inadequacy of damages for alienation of affections or criminal conversation. 36 ALR 2d 551.

Nonstatutory punitive damages as re-coverable from insurer for failure or delay in making payments due under contract. 37 ALR 2d 539.

Punitive damages for injuries by use of set gun, trap or similar device on defendant's own property. 44 ALR 2d 397.

Punitive damages as recoverable for attorney's negligence with respect to maintenance or prosecution of litigation or appeal. 45 ALR 2d 69.

Exemplary damages as recoverable for trade-mark infringement or unfair competition. 47 ALR 2d 1117.

Punitive damages for pollution stream. 49 ALR 2d 311.

Punitive damages for conversion of personalty. 54 ALR 2d 1361.

Sleeping-car company's liability for punitive damages for employee's assault upon passenger. 60 ALR 2d 1115.

Right to punitive or exemplary damages in action for personal injury caused by operation of automobile. 62 ALR 2d 813.

Action or claim for punitive damages as surviving death of person wronged. 63 ALR 2d 1327.

Child of tender years as liable in tort for punitive damages. 67 ALR 2d 576.

Right of principal to recover punitive damages for agent's or broker's breach of duty. 67 ALR 2d 952.

Principal's liability for punitive damages for false arrest or imprisonment caused by agent or servant. 92 ALR 2d 37.

Exemplary damages in action against telephone company for mistake in or omission from its directory. 92 ALR 2d 925.

CHAPTER 3

MEASURE OF DAMAGES

Section 17-301. Measure of damages for breach of contract.

17-302. Damages must be certain.

17-303.

Breach of contract to pay liquidated sum. Detriment caused by breach of covenant of seizin, etc., what is. 17-304. 17-305. Detriment caused by breach of covenant against encumbrances, what

17-306.

Breach of agreement to convey real property. 17-307. Breach of agreement to buy real property.

17-308 to 17-314. Repealed.

17-315. Breach of carrier's obligation to receive goods, etc.

17-316. Breach of carrier's obligation to deliver.

17-317. Carrier's delay.

Breach of warranty of authority. 17-318.

17-319. Repealed.

(8667) Measure of damages for breach of contract. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

History: En. Sec. 4300, Civ. C. 1895; re-en. Sec. 6048, Rev. C. 1907; re-en. Sec. 8667, R. C. M. 1921. Cal. Civ. C. Sec. 3300. Based on Field Civ. C. Sec. 1840.

Action on Injunction Bond

The measure of damages in an action on an injunction bond is the amount which will compensate for all the detriment proximately caused by the injunction during the time it was in operation, or which, in the ordinary course of things, was likely to result therefrom. McDermott v. American Bonding Co. of Baltimore, 56 M 1, 5, 179 P 828.

Where a party is precluded from moving to dissolve an injunction, and is driven to the remedy of trying to defeat the injunction, in which effort he is successful, the necessary court costs and fees of witnesses are a direct result of the wrongful issuance of the injunction, and constitute a recoverable item of damages in an action on the bond given pursuant to section 93-4207. McDermott v. American Bonding Co., of Baltimore, 56 M 1, 5, 179 P 828.

The measure of damages prescribed by this section is applied in an action on an injunction bond. Sheridan County Electric Co-op., Inc. v. Ferguson, 124 M 543, 227 P 2d 597, 601.

Allegation of Damages Sufficient as against a Demurrer

A complaint is sufficient to withstand a general demurrer interposed on the ground that the proper measure of damages was not pleaded, if it warrants recovery in any amount. Davenport v. Western Union Tel. Co., 91 M 570, 579, 9 P 2d 172.

Applicable to Obligations Arising from Contract

The measure of damages in an action for damages for failure of seller to promptly deliver equipment for a plow, resulting in loss by buyer in preventing performance of a plowing contract, is that specified in this section as an obligation arising from contract, and not that provided in section 17-401, as damages arising ex delicto. Hall v. Advance-Rumely Thresher Co., 65 M 566, 575, 212 P 290.

Attorneys' Fees, as Such, Not Recoverable—When Recoverable as Compensatory Damages

Attorneys' fees, as such, are not allowable as part of the damages in an action for breach of contract in the absence of

contractual stipulation therefor or statutory allowance thereof, but where a lessee of farm lands in his attempt to obtain possession prior to commencement of action incidentally paid a small amount to an attorney, the amount so paid was properly recoverable as an element of compensatory damages. Smith v. Fergus County, 98 M 377, 384, 39 P 2d 193.

Attorney Fees-Failure To Pay

A client's failure to pay an attorney his fee, when it becomes due, is a breach of an obligation arising from contract, and the measure of damages for such breach is the principal amount due at the completion of the services, plus the detriment proximately caused by the client's failure to pay, that is, legal interest for loss of the use of the money from that time up to the date of trial. Myers v. Bender, 46 M 497, 508, 129 P 330.

Breach by Both Parties

Where buyer of exclusive business rights in a territory broke contract by failing to make payments as they fell due and seller broke the contract by doing business in the same territory, seller could not defend his breach by claiming a rescission of the contract when he later brought an action for the amount due on it and buyer was entitled to set off amount of profit seller took from the territory. Leiman-Scott, Inc. v. Holmes, 142 M 58, 381 P 2d 489.

Detriment Proximately Caused

Circumstances under which damage to a mining company's credit, destruction of its business, and loss of its property through sales under a judgment secured by employees for wages due at the time an attachment was levied on its real property, was held not to have been the proximate consequences of the attachment, for which the surety on the attachment undertaking could be held liable. Plymouth Gold Min. Co. v. United States Fidelity & Guaranty Co. of Maryland, 35 M 23, 30, 88 P 565.

Where parties have been enjoined and the remedy by motion to dissolve is not available to them, and they pursue the only course recognized by the law to rid themselves of the restrictions imposed by the injunction, namely, to defeat it, and they are successful in so doing, the reasonable compensation paid for the services of counsel employed for the special purpose of defeating the injunction is the natural and proximate result of the

wrongful issuance of the injunction, and is recoverable under this section, in an action on the bond given under section 93-6809. McDermott v. American Bonding Co. of Baltimore, 56 M 1, 8, 179 P 828.

In action by plaintiffs, who purchased residence from contractor before it was completed, to recover for defective material and workmanship, instruction, although broad, was not prejudicial, where it read: "You are instructed that if you find from a preponderance of the evidence in this action that plaintiffs are entitled to damages, then in arriving at the measure of damages, it is the amount which will compensate the plaintiff for all detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom, or which has resulted therefrom." Mitchell v. Carlson, 132 M 1, 313 P 2d 717, 719, 720.

Hail Insurance

In an action by the insured against his insurer to recover loss to the insured trailer caused by a hail storm where the insurer failed to prove the measure of damages according to its theory of the case, the district court was not in error in entering judgment for the insured on the basis of estimate of cost of repairing hail damage. Eby v. Foremost Ins. Co., 141 M 62, 374 P 2d 857, 861.

Limitations

The damages recoverable for the breach of an obligation arising from contract must be limited to such as may fairly be supposed to have been within the contemplation of the parties when they entered into the contract, and such as might naturally be expected to result from its violation. In no case is the plaintiffentitled to recover anything more than he would have received had the contract been performed, by the defendant on his part assuming that it had been performed. Myers v. Bender, 46 M 497, 508, 129 P 330.

Sale of Land

Damages recoverable for a breach of contract of sale of farm lands are such as may fairly be supposed to have been within the contemplation of the parties when they entered into it and such as might naturally have been expected to result from its breach. Healy v. Ginoff, 69 M 116, 124, 220 P 539.

Although defendant was not entitled to retain down payment on land when no binding contract of sale was ever made, he should be allowed to retain so much thereof as would be necessary to compensate him for damage caused by defendant's occupancy of the land. Fink v. Doggett, 123 M 324, 214 P 2d 743.

Well Drilling's Business what y

Where defendant failed to complete contract calling for his drilling of a water well verdict of \$1,000 for plaintiff was proper. Hein v. Fox, 126 M 514, 254 P 2d 1076, 1079.

Wrongful Interference

Where full performance of a contract is prevented by the wrongful interference of one party, the other may treat such wrongful act as a breach of the contract, and sue at once for damages arising from his having been prevented from reaping all the benefits and advantages which would reasonably follow a complete performance on his part, and the measure of his recovery would be the difference between the contract price and the expense to him of doing the work. McFarland v. Welch, 48 M 196, 198, 136 P 394.

Wrongfully Discharged Teacher

Where wrongfully discharged teacher sued school board for breach of contract and the district court, in instructing the jury, declared that the jury could award the teacher a sum not exceeding \$2,000 as compensation for all detriment proximately caused by the letter of dismissal, an award of \$1,500 by the jury was not excessive. Wyatt v. School District No. 104, — M —, 417 P 2d 221, 225.

In an action for breach of contract, school board's failure to follow sections 75-1622 and 75-2411 in dismissal of teacher made the dismissal void for want of jurisdiction, entitling teacher to damages for loss of benefits which would reasonably have resulted from complete performance of the contract on her part, including loss of rent-free living quarters, a condition of employment, and expenses in seeking other employment. Wyatt v. School District No. 104, — M —, 417 P 2d 221, 225.

References

Clifton v. Willson, 47 M 305, 310, 132 P 424; General Fire Extinguisher Co. v. Northwestern Auto Supply Co., 70 M 1, 7, 223 P 504; Borgeas v. Oregon Short Line R. Co., 73 M 407, 417, 236 P 1069; Brown v. Homestake Exploration Co., 98 M 305, 39 P 2d 168; Richardson v. Crone, 127 M 200, 258 P 2d 970, 974 (dissenting opinion); Orford v. Topp, 136 M 227, 346 P 2d 566, 568.

Collateral References

Damages ≈ 117-126. 25 C.J.S. Damages §§ 73-79, 90, 91 (1-3). 22 Am. Jur. 2d 71, Damages, § 45.

Right to recover, in action for breach of contract, expenditures incurred in preparation for performance. 17 ALR 2d 1300.

Necessity that buyer, relying on market price as measure of damages for seller's

breach of sales contract, show that goods in question were available for market at

price shown. 20 ALR 2d 819.

Measure of damages for buyer's breach of contract to purchase article from dealer or manufacturer's agent. 24 ALR 2d 1008.

Measure of damages recoverable from architect or other person furnishing plans for defects or insufficiency of work attributable thereto. 25 ALR 2d 1085.

Exemplary damages for procuring breach of contract. 26 ALR 2d 1274.

Measure of tenant's damages upon landlord's breach of covenant to repair. 28 ALR 2d 480.

Damages in action by insured against insurance broker or agent with respect to procurement, continuance, terms, and coverage of insurance policies. 29 ALR 2d

203.
Damages recoverable for insurer for failure or delay in making payments due under contract. 37 ALR 2d 538.

Measure of damages for landlord's breach of duty under express covenant to repair, rebuild, or restore, where property is damaged or destroyed by fire. 38 ALR 2d 717.

Contracts for eradication or control of termites or other pests or vermin. 43 ALR 2d 1237.

Measure and elements of damages recoverable for breach of contract to support person. 50 ALR 2d 613.

Amount of attorney's compensation in absence of contract or statute fixing amount. 56 ALR 2d 13.

Employer's damages for breach of employment contract by employer's terminating employment. 61 ALR 2d 1008.

Measure and items of damages for lessee's breach of agreement to creet building, 63 ALR 2d 1110.

Recovery by conditional seller or buyer, or person standing in his shoes, against third person for damage or destruction of property. 67 ALR 2d 582.

Aggravated or mitigated damages for breach of contract to marry, 73 ALR 2d 576.

Damages for breach of implied obligation of purchaser to conduct search for, or to develop or work premises for, minerals other than oil and gas. 76 ALR 2d 748.

Cost of correction or completion, or difference in value, as measure of damages for breach of construction contract. 76 ALR 2d 805.

Measure and items of damages for lessee's breach of covenant as to repairs. 80 ALR 2d 983.

Compensation recoverable under "changed conditions" clause in a public works or construction contract. 85 ALR 2d 235.

Measure of damages in action by grower under contract between grower of vegetable or fruit crops, and purchasing processor, packer, or canner. 87 ALR 2d 773.

Extent of liability, in action for breach of warranty, of seller of livestock infected with communicable disease. 87 ALR 2d 1317.

Mental anguish as element of damages in action for breach of contract to furnish goods. 88 ALR 2d 1367.

Measure of damages, to advertiser, for radio or television station's breach or wrongful termination of contract. 90 ALR 2d 1199.

Measure and elements of damages recoverable against union for breach of nostrike provision in collective bargaining agreement. 92 ALR 2d 1232.

Measure and elements of sublessee's damages recoverable from sublessor for latter's failure to exercise option to renew his lease. 94 ALR 2d 1345.

Extent of recovery for attempt to terminate employment or agency contract upon shorter notice than that stipulated in contract. 96 ALR 2d 277.

Measure of damages recoverable by lessee for breach of lessor's covenant against use of his other property in competition with lessee-covenantee. 97 ALR 2d 111.

Measure of damages for breach of standard new motor vehicle warranty. 99 ALR 2d 1440.

Attorneys' fees incurred in litigation with third person as damages in action for breach of contract. 4 ALR 3d 270.

Right and measure of recovery for breach of obligation to drill exploratory oil or gas wells. 4 ALR 3d 284.

17-302. (8668) Damages must be certain. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.

History: En. Sec. 4301, Civ. C. 1895; re-en. Sec. 6049, Rev. C. 1907; re-en. Sec. 8668, R. C. M. 1921. Cal. Civ. C. Sec. 3301. Field Civ. C. Sec. 1841.

Future Events

In an action for breach of contract, a requested instruction that the jury, in fix-

ing damages for nonperformance in the future, should make allowance for the uncertainties which affect all conclusions depending on future events, and that only such evidence as was reasonably certain to extend to future events should be considered in fixing damages for nonperformance of the contract, was vague and inde-

finite, and not authorized by this section. Brazell v. Cohn, 32 M 556, 562, 563, 81 P 339.

Lack of Definite Statements

Where, in an action for the breach of a contract, the admitted facts do not show injury, and there is a lack of definite statement by witnesses justifying an inference that the defendant has suffered damage, a claim for damages in a substantial amount is properly considered without foundation in the evidence. Busbee v. Gagnon Co., 50 M 203, 211, 146 P 275.

Under this section, no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin. Rocky Mountain Fire Ins. Co. v. Belcher, 96 M 409, 415, 31 P 2d 316.

Profits—When Recoverable and When Not

Under this section, profits which are a mere matter of speculation cannot be made the basis of recovery in a suit for breach

of contract; otherwise where the profits can be shown to have been reasonably certain. Jurcec v. Raznik, 104 M 45, 50, 64 P 2d 1076.

Reasonable Amount

The measure of damages recoverable in an action for breach of contract under which defendant was required to sow a tract of land in grain, etc., was such reasonable amount, clearly ascertainable in both nature and origin, as to compensate plaintiff for the damages resultant, and such additional amount as in the ordinary course of things would likely result from the breach. Harrington v. Moore Land Co., 59 M 421, 423, 196 P 975.

References

Lewis and Clark County v. Nett, 81 M 261, 269, 263 P 418; Brown v. Homestake Exploration Co., 98 M 305, 39 P 2d 168.

Collateral References

Damages \$56. 25 C.J.S. Damages \$28.

17-303. (8669) Breach of contract to pay liquidated sum. The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon.

History: En. Sec. 4302, Civ. C. 1895; re-en. Sec. 6050, Rev. C. 1907; re-en. Sec. 8669, R. C. M. 1921. Cal. Civ. C. Sec. 3302. Field Civ. C. Sec. 1842.

References

Miller v. Yellowstone Irr. Dist., 91 M 538, 541, 9 P 2d 795.

Collateral References

Damages 74-86. 25 C.J.S. Damages §§ 101-116. Provision in land contract for forfeiture of payments as one for liquidated damages or penalty. 6 ALR 2d 1401.

or penalty. 6 ALR 2d 1401.
Validity, construction, and effect of stipulated damages clause in fire or burglar alarm service contract. 42 ALR 2d 591.

Liability of building or construction contractor for liquidated damages for breach of time limit provision where he abandons work after time fixed for its completion. 42 ALR 2d 1134.

- 17-304. (8670) Detriment caused by breach of covenant of seizin, etc., what is. The detriment caused by the breach of a covenant of "seizin," of "right to convey," of "warranty," or of "quiet enjoyment," in a grant of an estate in real property, is deemed to be:
- 1. The price paid to the grantor; or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property.
- 2. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding five years.
- 3. Any expenses properly incurred by the covenantee in defending his possession.

History: En. Sec. 4304, Civ. C. 1895; re-en. Sec. 6052, Rev. C. 1907; re-en. Sec. 8670, R. C. M. 1921. Cal. Civ. C. Sec. 3304. Based on Field Civ. C. Sec. 1844.

References

Healy v. Ginoff, 69 M 116, 124, 220 P 539.

Collateral References ... Cartage !:

Covenants©=124-132.

21 C.J.S. Covenants §§ 142-150. 20 Am. Jur. 2d 690, Covenants, Conditions and Restrictions, § 132.

Remedy of tenant against stranger wrongfully interfering with his possession. 12 ALR 2d 1192.

Measure of damages for breach of covenant for quiet enjoyment in lease. 41 ALR 2d 1454.

Measure of vendee's recovery in action for damages for vendor's delay in conveying property. 74 ALR 2d 578.

Nominal damages for lessor's breach of covenant to put lessee into possession. 88 ALR 2d 1032.

17-305. (8671) Detriment caused by breach of covenant against encumbrances, what is. The detriment caused by the breach of a covenant against encumbrances, in a grant of an estate in real property, is deemed to be the amount which has been actually expended by the covenantee in extinguishing either the principal or interest thereof, not exceeding in the former case a proportion of the price paid to the grantor equivalent to the relative value at the time of the grant of the property affected by the breach, as compared with the whole, or, in the latter case, interest on a like amount.

History: En. Sec. 4305, Civ. C. 1895; re-en. Sec. 6053, Rev. C. 1907; re-en. Sec. 8671, R. C. M. 1921, Cal. Civ. C. Sec. 3305. Field Civ. C. Sec. 1845.

(8672) Breach of agreement to convey real property. The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land.

History: En. Sec. 4306, Civ. C. 1895; re-en. Sec. 6054, Rev. C. 1907; re-en. Sec. 8672, R. C. M. 1921. Cal. Civ. C. Sec. 3306. Field Civ. C. Sec. 1846.

Cost of Altering Other Property

Where, under instructions based on this section and section 17-602 (since repealed), the jury was told that the plaintiff could recover the difference between the price agreed to be paid and the price plaintiff would be required to pay for similar property, the jury could not properly award an amount based on the projected costs of making some other property similar. Orford v. Topp, 136 M 227, 346 P 2d 566, 569.

Damage Where Bad Faith Is Not Alleged

Plaintiff having failed to allege bad faith, in an action to recover the amount paid by him to secure title to real estate, after discovering that defendant was unable to convey, the measure of damages was the amount paid to defendant on the purchase price, together with incidental expenses. Willard v. Smith, 34 M 494, 498, 87 P 613.

"Expenses Properly Incurred"

In an action to recover damages for the breach of an agreement to convey real property, situated in another state, expenses incurred by the plaintiff in removing his family to that state, preparatory to taking possession of the lands sold to him by the defendant, as well as counsel fees and court costs paid by the plaintiff in defending an action to quiet title, brought against him by the defendant's prior grantee, are recoverable under this section as "expenses properly incurred in preparing to enter upon the land." Ross v. Saylor, 39 M 559, 570, 104 P 864.

Where the jury returned a verdict "for necessary expenses in preparing to take possession of the land," while the court in its instruction employed the words of the statute, "expenses properly incurred," there was no substantial difference between the two expressions, and the verdict was sufficient, in the absence of an objection thereto at the trial. Ross v. Saylor, 39 M 559, 570, 104 P 864.

Kind of Agreement

This section applies to an agreement to convey an equitable as well as a legal estate. Ross v. Saylor, 39 M 559, 565, 104 P 864.

Lease of Building under Construction

Under contract to lease a building under construction, the proper measure of damages is the difference between the price agreed to be paid as rent and the reasonable value of the term agreed upon at the time of the breach, and any expenses properly incurred by plaintiff in preparing to take possession in reliance on the agreement. Jurcec v. Raznik, 104 M 45, 51, 64 P 2d 1076.

Price of Other Property

This section and section 17-602 (since repealed) must be applied together in an appropriate case and, thus, where bad faith is shown, the aggrieved buyer's damages are set at the difference between the price he agreed to pay and the price he is required to pay on the market for equivalent property. Orford v. Topp, 136 M 227, 346 P 2d 566, 568.

Prompt Declaration of Termination Necessary or Option on Notice Deemed Waived

Under an installment contract for sale of real property, making time of its essence, and providing that in case of default on any installment the vendor shall have the option to declare the contract terminated, such option must be promptly exercised or failure of timely payment is presumed waived and the contract still valid, and if it provides for thirty-day notice to terminate it, the giving thereof is essential to the exercise of the option for its termination. Thompson v. Lincoln Nat. Life Ins. Co., 110 M 521, 523, 105 P 2d 683.

Property of Peculiar Value

This section and section 17-603 must

be construed together in determining damages in a case where the property of which the buyer is deprived has a peculiar value to him. Orford v. Topp, 136 M 227, 346 P 2d 566, 569.

Where there was no evidence to show any peculiar value to the plaintiffs in the property of which they were deprived, a verdict in excess of the difference between the price which the purchasers agreed to pay and the price for which the property was sold by the vendor was not supported. Orford v. Topp, 136 M 227, 346 P 2d 566, 569.

When Anticipated Profits Not Recoverable—New Venture

Anticipated profits from an established business are recoverable upon showing prior profits in the same location, but where plaintiff was about to embark on a new business venture when prevented by lessor's wrongful act in leasing the premises to another, they may not be made the basis of an action for breach of contract, since it cannot be proved what the profits would have been. Jurcee v. Raznik, 104 M 45, 50, 64 P 2d 1076.

References

Thompson v. Lincoln Nat. Life Ins. Co., 114 M 521, 534, 138 P 2d 951; Wyatt v. School District No. 104, — M —, 417 P 2d 221, 224.

Collateral References

Vendor and Purchaser 351.

92 C.J.S. Vendor and Purchaser § 591

55 Am. Jur. 945, Vendor and Purchaser, § 553 et seq.

Specific performance: Compensation or damages awarded purchaser for delay in conveyance of land. 7 ALR 2d 1204.

17-307. (8673) Breach of agreement to buy real property. The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him.

History: En. Sec. 4307, Civ. C. 1895; re-en. Sec. 6055, Rev. C. 1907; re-en. Sec. 8673, R. C. M. 1921. Cal. Civ. C. Sec. 3307. Field Civ. C. Sec. 1847.

Collateral References

Vendor and Purchaser 330.

92 C.J.S. Vendor and Purchaser §§ 528-537, 591-607.

55 Am. Jur. 900, Vendor and Purchaser, § 509 et seq.

17-308 to 17-314. (8674 to 8680) Repealed—Chapter 264, Laws of 1963.

Repeal

These sections (Secs. 4308 to 4314, Civ. C. 1895), relating to breaches of contracts

to buy or sell personal property, were repealed by Sec. 10-102, Ch. 264, Laws 1963.

17-315. (8681) Breach of carrier's obligation to receive goods, etc. The detriment caused by the breach of a carrier's obligation to accept freight, messages, or passengers, is deemed to be the difference between the amount which he had a right to charge for the carriage and the amount which it would be necessary to pay for the same service when it ought to be performed.

History: En. Sec. 4315, Civ. C. 1895; re-en. Sec. 6063, Rev. C. 1907; re-en. Sec. 8681, R. C. M. 1921. Cal. Civ. C. Sec. 3315. Field Civ. C. Sec. 1855.

Collateral References

Carriers \$33. 13 C.J.S. Carriers §33. 13 Am. Jur. 2d 761, Carriers, § 253.

17.316. (8682) Breach of carrier's obligation to deliver. The detriment caused by the breach of a carrier's obligation to deliver freight, where he has not converted it to his own use, is deemed to be the value thereof at the place and on the day at which it should have been delivered, deducting the freightage to which he would have been entitled if he had completed the delivery.

History: En. Sec. 4316, Civ. C. 1895; re-en. Sec. 6064, Rev. C. 1907; re-en. Sec. 8682, R. C. M. 1921. Cal. Civ. C. Sec. 3316. Field Civ. C. Sec. 1856.

Collateral References Carriers 94 (4).

13 C.J.S. Carriers § 184. 13 Am. Jur. 2d 918, Carriers, § 447.

Extent of liability of carrier for deviation in transportation of property. 33 ALR 2d 230.

17-317. (8683) Carrier's delay. The detriment caused by a carrier's delay in the delivery of freight is deemed to be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered and the day of its actual delivery.

History: En. Sec. 4317, Civ. C. 1895; re-en. Sec. 6065, Rev. C. 1907; re-en. Sec. 8683, R. C. M. 1921. Cal. Civ. Sec. 3317. Field Civ. C. Sec. 1857.

Notice of Urgency of Shipment

In order to charge a carrier with special damages arising from delay in the shipment of freight, such as stock feed, no-

tice of the urgency of the shipment must be brought home to the carrier. Sankey v. Chicago, M. & St. P. Ry. Co., 60 M 242, 245, 198 P 544.

Collateral References

Carriers 105.

13 C.J.S. Carriers § 221-230.

13 Am. Jur. 2d 861, Carriers, § 377.

17-318. (8684) Breach of warranty of authority. The detriment caused by the breach of a warranty of an agent's authority is deemed to be the amount which could have been recovered and collected from his principal if the warranty had been complied with, and the reasonable expenses of legal proceedings taken, in good faith, to enforce the act of the agent against his principal.

History: En. Sec. 4318, Civ. C. 1895; re-en. Sec. 6066, Rev. C. 1907; re-en. Sec. 8684, R. C. M. 1921. Cal. Civ. C. Sec. 3318. Field Civ. C. Sec. 1858.

Collateral References

Principal and Agent 149 (2), 150 (3). 3 C.J.S. Agency §§ 205, 333.

17-319. (8685) Repealed—Chapter 200, Laws of 1963.

Repeal relating to breach of promise of marriage, This section (Sec. 4319, Civ. C. 1895), was repealed by Sec. 7, Ch. 200, Laws 1963.

CHAPTER 4

DAMAGES FOR WRONGS

Section 17-401. Breach of obligation other than contract. 17-402. Wrongful occupation of real property.

17-403. Willful holding over.

17-404. Conversion of personal property.

17-405. Conversion of personal property-application to benefit of owner.

17-406. Damages of lienor.

17-407. Seduction.

17-408. Injuries to animals.

17-409. Liability of owner of vicious dog.

17-410. Emergency care rendered at scene of accidents.

17-401. (8686) Breach of obligation other than contract. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

History: En. Sec. 4330, Civ. C. 1895; re-en. Sec. 6068, Rev. C. 1907; re-en. Sec. 8686, R. C. M. 1921. Cal. Civ. C. Sec. 3333, Field Civ. C. Sec. 1860.

Conversion

An action to recover the value of ore, alleged to have been mined from a vein owned by the plaintiff, and to have been converted by the defendant, is the same in legal effect as an action for the conversion of personal property; and, in view of this section and section 17-404, the plaintiff, where he prevails, is entitled, as a matter of law, to interest on the value of the ore converted. Montana Min. Co v. St. Louis Min. & Mill. Co., 183 Fed 51, 70.

Estimation of Damage To Property

Where plaintiff suffered damage to motel property from sewage seeping into basement caused by defendant's workmen having negligently broken sewer line and left it open overnight, but where plaintiff's list of items damaged was ridiculously long and included discarded items, damages should have been calculated on the value of the items just before they were damaged, and not on the basis of what they would cost to replace. Spackman v. Ralph M. Parsons Co., — M —, 414 P 2d 918.

False Imprisonment

In an action to recover damages for false imprisonment, the court may properly call the attention of the jury to the provisions of this section as to the measure of recovery. Kroeger v. Passmore, 36 M 504, 510, 93 P 805.

Instructions Based on This Section

In an action by an inexperienced laundry employee, who was injured while feeding a mangle, an instruction that, if she

was injured by defendants' negligence, she was entitled to recover what would compensate for all damage "proximately caused by the negligence of defendants, whether such damage could be anticipated or not," was not objectionable for failing to specify by whom the damage need not be anticipated, where there was no showing in the record that defendants asked for any more definite declaration upon the subject. In the case of such an employee, the doctrine of assumption of risk has no application. Coleman v. Perry, 28 M 1, 8, 72 P 42. See Coulter v. Union Laundry Co., 34 M 590, 603, 606, 87 P 973.

In an action in conversion, the giving of an instruction submitting to the jury the measure of damages declared by this section is error, the rule thus established being inapplicable to such a case. Ferrat v. Adamson, 53 M 172, 181, 163 P 112.

Where the facts are few and simple it is not error to give instructions containing abstract statements of statutory law; therefore, in such a case, instructions giving verbatim section 17-208, as to when exemplary damages may be allowed, and this section, on the measure of damages for the breach of an obligation other than contract, may not be held erroneous. Johnson v. Horn, 86 M 314, 321, 283 P 427.

Loss of Profits

A person may recover for loss of profits where it is shown that such loss is the natural and direct result of the act of the defendant complained of and that such amount is certain and not speculative. Cruse v. Clawson, 137 M 439, 352 P 2d 989, 994.

Nuisance Maintained by City

In case a city maintains a nuisance, the measure of damages is declared by this section to be the amount which will compensate the injured party for all the detriment proximately caused thereby. Murray v. City of Butte, 35 M 161, 169, 88 P 789.

Personal Injury Actions

There is no measuring stick by which to determine the amount of damages to be awarded in personal injury actions. Each case must depend upon its own particular facts. Chavez v. United States, 192 F Supp 263, 270.

Proximate Cause

To enable the plaintiff, in an action for personal injuries, to recover damages, he must show that the negligence charged was a proximate cause of the injury. Therriault v. England, 43 M 376, 382, 116 P 581

Question of Anticipation by Wrongdoer

In an action for damages, it is not necessary to show that the wrongdoer ought to have anticipated the particular injury which resulted; it is sufficient to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence. Mize v. Rocky Mountain Bell Tel. Co., 38 M 521, 532, 100 P 971. See Stewart v. Stone & Webster Engineering Corp., 44 M 160, 176, 119 P 568.

Where farmer was unable to pay off lien for repairs on truck, which was damaged by oil company's negligence in putting diesel fuel in it, time lost beyond that needed to repair the vehicle was compensable, even though unanticipated by the oil company. Stahl v. Farmers Union Oil Co. of Richland, 145 M 106, 399 P 2d 763.

What May Be Considered in Estimating Damages

In an action for personal injuries, the jury, in fixing the damages, may consider mental and physical suffering caused by the injury, wages plaintiff might have earned from the date of the injury to the date of the trial, and if the injuries were permanent, any loss by reason of the impairment of his capacity to earn money. Bourke v. Butte Electric & Power Co., 33 M 267, 289, 83 P 470.

Where a party injured through the maintenance of a nuisance by a city has abated it at his own expense, after a refusal by the municipality to remedy the evil, the necessary outlay so incurred is part of his detriment proximately caused by its maintenance, and recoverable as an element of his damages. Murray v. City of Butte, 35 M 161, 169, 88 P 789.

Merely because the earning capacity of plaintiff, a farmer sixty-eight years old, who was injured by falling into an open cellarway, may have been so small as to be a negligible element in making up the estimate of the damages which he could recover, he was none the less entitled to compensation for the destruction of his capacity to pursue his established course of life, an element distinct from loss of earning capacity. Montague v. Hanson, 38 M 376, 386, 99 P 1063. See Mullery v. Great Northern Ry. Co., 50 M 408, 426, 148 P 323.

If the engineer of a railway train sees a signal to stop, but fails to stop, for a sick passenger, the probable serious consequences to follow from missing the train may be considered as an element of damages. Burles v. Oregon Short Line R. Co., 49 M 129, 133, 140 P 513. See Jones v. Shannon, 55 M 225, 234, 175 P 882.

An instruction that if the evidence made it appear that plaintiff's earning capacity had been impaired by reason of his injuries, the jury should compensate him for such impairment, without stating a rule or guide for arriving at the amount to be awarded in that behalf, was faulty. Zanos v. Great Northern Ry. Co., 60 M 17, 22, 198 P 138.

Although oil company, which negligently put diesel fuel in farmer's truck, was liable for the loss of the truck's use beyond the time reasonably necessary to make repairs, damages were limited to the cost of the truck, since, as a consequence of law, court found no distinction between cases in which property is totally destroyed and those in which it is damaged, but repairable. Stahl v. Farmers Union Oil Co. of Richland, 145 M 106, 399 P 2d 763.

Wrongful Occupation of Land

Although defendant was not entitled to retain down payment on land when no binding contract of sale was ever made, he should be allowed to retain so much thereof as would be necessary to compensate him for damage caused by defendant's occupancy of the land. Fink v. Doggett, 123 M 324, 214 P 2d 743.

References

Thornton-Thomas Mercantile Co. v. Bretherton, 32 M 80, 98, 80 P 10; Dunlavey v. Doggett, 38 M 204, 207, 99 P 436; Rand v. Butte Electric Ry. Co., 40 M 398, 412, 107 P 87; Clifton v Willson, 47 M 305, 311, 132 P 424; Chesnut v. Sales, 49 M 318, 324, 141 P 986; Bush v. Chilcott, 64 M 346, 351, 210 P 907; Hall v. Advance-Rumely Thresher Co., 65 M 566, 575, 212 P 290; Davenport v. Western Union Tel. Co., 91 M 570, 579, 9 P 2d 172; Sult v. Scandrett, 119 M 570, 168 P 2d 405, 409; Hoenstine v. Rose, 131 M 557, 312 P 2d 514, 517; Speck v. Cottonwood Coal Co., 116 F 2d 489, 491.

Collateral References

Damages@95-116. 25 C.J.S. Damages § 71 et seq. 22 Am. Jur. 2d 114, Damages, § 80.

Liability of municipality or other govsubdivision in connection ernmental with flood-protection measures. 5 ALR 2d

Marriage of child, or probability of marriage, as affecting measure of recovery by parents in death action. 7 ALR 2d 1380.

Substantial damages for death of minor. 14 ALR 2d 539.

Damages for invasion of right of privacy. 14 ALR 2d 773.

Recovery for loss of business resulting from resale of unwholesome food or beverages furnished by another. 17 ALR 2d 1379.

Recovery for mental anguish from witnessing injury to another where plaintiff is injured in same accident. 18 ALR 2d

Effect of board or lodging furnished to injured person in connection with hospital or nursing care on damages recoverable in personal injury action. 18 ALR

Measure of damages for pollution of well, cistern, or spring. 19 ALR 2d 769.

Damages recoverable for expulsion from social club or similar society. 20 ALR 2d 404.

Measure of damages for refusal of corporation or its agent to register or effec-

tuate transfer of stock, 22 ALR 2d 62. Measure of damages for fraudulently procuring services at lowered rate or gratuitously. 24 ALR 2d 742.

Damages recoverable for obstruction or diversion of subterranean waters in use of land. 29 ALR 2d 1378.

Measure of damages in tort action arising out of delay in passing upon application for insurance. 32 ALR 2d 536.

Damages recoverable from warehousemen for negligence causing injury to, or destruction of, goods of a perishable nature. 32 ALR 2d 910.

Cost of hiring substitute or assistant during incapacity of injured party as item of damages in action for personal injuries. 37 ALR 2d 364.

Damages in action for slander of title based on recording of instrument purporting to affect title. 39 ALR 2d 855.

Expense incurred by injured party in remedying temporary nuisance or in preventing injury as element of damages recoverable. 41 ALR 2d 1064.

Death of beneficiary of action for wrongful death as affecting damages recoverable. 43 ALR 2d 1303.

Duty of injured person to minimize tort

damages by medical or surgical treatment. 48 ALR 2d 346.

Right of employer, liable for wrongful discharge or retirement, to reduce or mitigate damages by amount of social security or retirement benefits received by employee. 48 ALR 2d 1293.

Nominal damages for pollution

stream. 49 ALR 2d 309.

Cost of annuity as factor for consideration in fixing damages in personal injury action. 53 ALR 2d 1454.

Duty of one suing for damage to vehicle to minimize damages, 55 ALR 2d 936.

Damages recoverable by employer from third person tortiously killing or injuring employee. 57 ALR 2d 812.

Per diem or similar mathematical basis for fixing damages for pain and suffering. 60 ALR 2d 1347.

Right to nominal damages for unauthorized geophysical or seismograph exploration or survey. 67 ALR 2d 457.

Hospital and medical services nished to injured person by government as affecting damages recoverable for personal injury or death. 68 ALR 2d 876.

Recovery of nominal damages in wrong-

ful death action. 69 ALR 2d 628.

Anxiety as to future disease, condition, or death therefrom, as element of damages in personal injury action. 71 ALR 2d 338.

Measure of damages for destruction of or injury to airplane. 73 ALR 2d 719.

Business losses and expenses as damages recoverable by successful plaintiff or relator in mandamus. 73 ALR 2d 920.

Losses incidental to expulsion from union or society as damages recoverable by successful plaintiff or relator in mandamus. 73 ALR 2d 923.

Damages recoverable in action against labor union or its officers or members for wrongful suspension or expulsion of member. 74 ALR 2d 803.

Fluctuations in cost of making repairs between time of loss and time of payment as affecting property insurer's liability. 74 ALR 2d 1272.

Receipt of public or private pension as affecting recovery against tort-feasor. 75 ALR 2d 885.

Decedent's pension, retirement income, social security payments, and the like, as affecting recovery in wrongful death action. 81 ALR 2d 949.

Damages for wrongful death of husband or father as affected by receipt of social security benefits. 84 ALR 2d 764.

Mitigation of damages in action against attorney for negligence in preparing or recording security document. 87 ALR 2d 995.

Recovery for loss of earnings or earning capacity as affected by termination of disability benefits if injured person has other earnings. 88 ALR 2d 483.

Damages for personal injury or death as including value of care and nursing gratuitously rendered. 90 ALR 2d 1323.

Wrongful death damages for loss of expectancy of inheritance from decedent.

91 ALR 2d 477.

Period for which damages are recoverable or are computed under injunction bond, 95 ALR 2d 1190.

Apportionment of damages involving

successive impacts by different motor ve-

hicles. 100 ALR 2d 16.
Civil liability of one causing personal injury for consequences of negligence, mistake or lack of skill of physician or surgeon. 100 ALR 2d 808.

Collateral source rule: Injured person's receipt of statutory disability unemployment benefits as affecting recovery against

tort-feasor. 4 ALR 3d 535.

17-402. (8687) Wrongful occupation of real property. The detriment caused by the wrongful occupation of real property, in cases not embraced in sections 17-403, 17-501 and 17-502 or provided in the Code of Civil Procedure (Title 93) is deemed to be the value of the use of the property for the time of such occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession.

History: En. Sec. 4331, Civ. C. 1895; re-en. Sec. 6069, Rev. C. 1907; re-en. Sec. 8687, R. C. M. 1921. Cal. Civ. C. Sec. 3334. Based on Field Civ. C. Sec. 1861.

Rental Value

In an action for the wrongful occupation and detention of real property, the rental value thereof, during the time of such wrongful occupation, may be proved as an element of damages, under an allegation that the "reasonable value of the rents and profits for the use and occupa-tion of the premises" is a designated sum. Leyson v. Davenport, 38 M 62, 68, 98 P 641.

Fact that plaintiff had closed its gasoline filling station entirely because of lack of business prior to its occupancy by defendant would not prove that the property has no rental value. Pritchard Petroleum Co. v. Farmers Co-op. Oil & Supply Co., 121 M 1, 190 P 2d 55, 59.

Tenant at Sufferance

Where a tenant by sufferance planted, raised, and harvested crops, he is answerable under this section for a sum equal at least to the value of the use and occupation of the land during his wrongful possession of it. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 412, 177 P 406.

Since this section provides that the detriment caused by the wrongful occupation of land is deemed to be the value of the use of the property for the time of such occupation, an action under it, and not one in conversion to recover a crop grown on land or its value, by a purchaser at foreclosure sale from a tenant alleged to have wrongfully refused to deliver possession on demand, is the proper remedy, the crop or its value including not only the value of the use of the land but also the value of the seed planted and the time and labor of him who plants and culti-

vates the land. Kester v. Amon, 81 M 1, 13, 14, 261 P 288.

Unlawful Detainer

In an action in unlawful detainer by the United States against a lessee of Montana Indian lands, continuing in possession after expiration of lease and after the land was leased to a new tenant, judgment was authorized, under section 93-9715, "for three times the amount of the damages" which are under this section "the value of the use of the property for the time of" the occupation by appellant. Stoltz v. United States, 99 F 2d 283, 285.

Value of the Use

The value of the use is the value to the owner of the property, not the value to the wrongdoer. Pritchard Petroleum Co. v. Farmers Co-op. Oil Supply Co., 121 M 1, 190 P 2d 55, 58.

The value of the use is ordinarily held to be the reasonable rental value of the premises withheld. Pritchard Petroleum Co. v. Farmers Co-op. Oil & Supply Co., 121 M 1, 190 P 2d 55, 58.

In action to recover the value of the use and occupancy of a tract of land which had been used as a filling station it was proper to sustain objection to testimony as to the value of the use of land with respect to each gallon of gasoline and cach pound of grease sold, since it is not the withholder's gain but the rental value that measures the compensation. Pritch-ard Petroleum Co. v. Farmers Co-op. Oil & Supply Co., 121 M 1, 190 P 2d 55, 59.

"Wrongful"

Where plaintiffs leased land to defendant for purpose of mining coal, and lease did not grant defendant a right to mine by "outstroke" (which is mining by hoisting or removing ore from an adjoining mine through a shaft or opening in demised premises), to which use defendants

put the land without consent, and it was not claimed that such use damaged the freehold or reversionary interest, and plaintiffs reserved no right of use in themselves, defendant's occupation was not "wrongful" within this section, so as to authorize plaintiffs to recover from defendant the reasonable value of unauthorized use of plaintiffs' land. Speek v. Cotton-Wood Coal Co., 116 F 2d 489, 491.

References

Dunlavcy v. Doggett, 38 M 204, 207, 99 P 436; Toole v. Weirick, 39 M 359, 366, 102 P 590; Ferrat v. Adamson, 53 M 172, 181, 163 P 112; Adams v. Durfee, 67 M 315, 318, 215 P 664.

Collateral References

Trespass@=47-63. 87 C.J.S. Trespass §§ 105-125.

17-403. (8688) Willful holding over. For willfully holding over real property, by a person who entered upon the same, as guardian or trustee for an infant, or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination, the measure of damages is the value of the profits received during such holding over.

History: En. Sec. 4332, Civ. C. 1895; re-en. Sec. 6070, Rev. C. 1907; re-en. Sec. 8688, R. C. M. 1921. Cal. Civ. C. Sec. 3335. Field Civ. C. Sec. 1862.

References

Ferrat v. Adamson, 53 M 172, 181, 163 P 112; Kester v. Amon, 81 M 1, 13, 261 P

Collateral References

Guardian and Ward = 133; Life Estates

© 28; Trusts 374. 31 C.J.S. Estates § 67; 39 C.J.S. Guardian and Ward §§ 200, 209; 90 C.J.S. Trusts § 475.

32 Am. Jur. 783, Landlord and Tenant, § 926 et seq.

17-404. (8689) Conversion of personal property. The detriment caused by the wrongful conversion of personal property is presumed to be:

- The value of the property at the time of its conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and,
- A fair compensation for the time and money properly expended in pursuit of the property.

History: En. Sec. 4333, Civ. C. 1895; re-en. Sec. 6071, Rev. C. 1907; re-en. Sec. 8689, R. C. M. 1921. Cal. Civ. C. Sec. 3336. Field Civ. C. Sec. 1863.

Application of Section

The measure of damages applicable in an action brought by a partner to recover the value of his interest in the partnership property sold to a stranger by his copartner in violation of subdivision 3 of section 7998, R. C. M. 1935 (since repealed) is that fixed by this section as the reasonable value of the property at the date of the conversion, or the highest market value at any time between the conversion and the verdict. Doll v. Hennessy Mercantile Co., 33 M 80, 89, 81 P

Duty To Elect

The party injured must elect which of the two measures of damages provided by this section he will claim, and he may not be permitted to rely upon both in the same case. Thornton-Thomas Mercantile

Co. v. Bretherton, 32 M 80, 99, 80 P 10. In an action for conversion plaintiff may elect to claim damages for the value of the chattel at the time of the alleged conversion, or its highest market value at any time between the conversion and the verdict, without interest (this section), but he may not claim both. Klind v. Valley County Bank of Hinsdale, 69 M 386, 389, 222 P 439.

Inequitableness or Unjustness Cannot Deprive Plaintiff of Right to Highest Market Value

Where plaintiff in an action in conversion has brought himself within the rule requiring diligence in prosecuting the action (this section), the fact that the measure of damages recoverable under it may be inequitable and unjust cannot deprive him of his right to recover the highest market value of the property at any time between the conversion and the verdict, at plaintiff's option, which he might

have obtained but for the wrongful act of defendant. State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 61 M 215, 228, 201 P 687.

Instruction on Section

In an action in conversion, the measure of damages established by this section is controlling, unless special damages are pleaded and proved, in which event correct practice requires an instruction so supplementing the measure pointed out by said section as to allow such additional damages as may be warranted by the circumstances of the particular case. Ferrat v. Adamson, 53 M 172, 181, 163 P 112.

An instruction on the measure of damages based on the value of the grain at the time of the conversion, to wit, when defendant refused to deliver it on demand, was proper under this section. O'Neill v. Montana Elevator Co., 65 M 259, 264, 211 P 222; First Nat. Bank of Kalispell v. Perrine, 97 M 262, 270, 33 P 2d 997.

Interest

In an action in claim and delivery, where all the evidence of value of the property was directed to the date of seizure, and it was not claimed it had any usable value, the damages for detention should have been limited to interest on the amount recovered from the date of seizure to the time the verdict was returned. Webster v. Sherman, 33 M 448, 459, 84 P 878.

In an action for conversion, the plaintiff is entitled to recover the value of personal property, at the time of its conversion, with interest from the date of the conversion. De Celles v. Casey, 48 M 568, 577, 139 P 586.

Where plaintiff in an action for conversion elects to take the value of the property in money, he is entitled to its value as of the date of the conversion fixed in the complaint if established by the evidence, and to legal interest thereon from that date, under this section. Sensiba v. Occident Elevator Co., 80 M 426, 430, 260 P 709.

When plaintiff elects to accept value of property at time of conversion, interest is allowed on that value from the date of conversion even though the value of the property is in dispute and the amount of the property converted has to be determined by the court or jury. Galbreath v. Armstrong, 121 M 387, 193 P 2d 630, 633.

Where plaintiff elected to accept value of property at time of conversion, interest from date of conversion was proper and court erred in ordering satisfaction of judgment for amount which did not include such interest. Galbreath v. Armstrong, 121 M 387, 193 P 2d 630, 634.

Where special damages for time and money expended in pursuit of the property were allowed the interest on such amount should be assessed after verdict under section 47-128 and should not run from the time of conversion. Galbreath v. Armstrong, 121 M 387, 193 P 2d 630, 634.

Pleading of Damages When Converted Does Not Deprive Plaintiff of Highest Market Value

Under this section, plaintiff in action for conversion does not, by pleading as his damages the value of property when converted, deprive himself of the right to insist upon damages according to the highest market value of the property at any time between the conversion and the verdict, since he is not required to plead the rule of damages, but may in any appropriate way, even by oral declaration in open court, announce his determination to demand the highest market value. Williams v. Gray, 62 M 1, 8, 203 P 524.

Value Means Market Value

The measure of damages in an action for conversion is the value of the property at the time of its conversion (this section) and this usually means its market value. Durocher v. Myers, 84 M 225, 229, 274 P 1062.

What Is the Detriment

Under this section, the detriment caused by the conversion of another's personalty is presumed to be its value at the time thereof, with interest from that time. Guthrie v. Holloran, 90 M 373, 380, 3 P 2d 406.

When Option as to Damages May Be Exercised

The giving of instructions authorizing the jury to award damages for the wrongful conversion of personal property under both the measures provided by this section, only one of which options could be taken advantage of by the injured party, was harmless error, where there was no evidence warranting the assessment of damages in accordance with one of the standards, and there was no claim that the amount of the verdict was excessive, or that the evidence was insufficient to justify the verdict. Thornton-Thomas Mercantile Co. v. Bretherton, 32 M 80, 99, 80 P 10.

Where an action in conversion has been prosecuted with reasonable diligence, the plaintiff may exercise the option granted him by this section, of demanding the highest market value of the property at any time between the conversion and the verdict, by giving notice, if he has not otherwise limited himself by his pleading, at any time before the submission of the

cause for verdict or decision. State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 61 M 215, 228, 201 P 687.

Plaintiff in an action in conversion may, by waiving interest, elect any date between that of the conversion and the date of the trial on which to lay his damages. Klus v. Lamire, 71 M 445, 447, 230 P 364.

References

Smith v. Caldwell, 22 M 331, 339, 56 P 590; Harrington v. Stromberg-Mullins Co., 29 M 157, 160, 74 P 413; Dunlavey v. Doggett, 38 M 204, 208, 99 P 436; Chesnut v. Sales, 49 M 318, 324, 141 P 986; Swanberg v. Schaefer, 88 M 16, 21, 289 P 561; Continental Supply Co. v. White, 92 M 254, 271, 12 P 2d 569; Sorenson v. Jacobson, 125 M 148, 232 P 2d 332, 338, 26 ALR 2d 1186; Montana Min. Co. v. St. Louis Min. & Mill Co., 183 Fed 51, 70.

Collateral References

Trover and Conversion \$\infty\$44-52.

89 C.J.S. Trover and Conversion § 163 et seq.

53 Am. Jur. 885, Trover and Conversion, § 94 et seq.

Credit for upkeep or other expense in computing damages for use or detention of property in replevin. 7 ALR 2d 933.

of property in replevin. 7 ALR 2d 933.

Measure of damages for conversion or loss of, or damage to personal property having no market value. 12 ALR 2d 933.

Damages recoverable for wrongful regis-

tration of trade-mark, 26 ALR 2d 1184.

Recovery of damages in replevin for

Recovery of damages in replevin for value of use of property detained, by successful party having only security interest as conditional vendor, chattel mortgagee, or the like. 33 ALR 2d 774.

17-405. (8690) Conversion of personal property—application to benefit of owner. The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent.

History: En. Sec. 4334, Civ. C. 1895; re-en. Sec. 6072, Rev. C. 1907; re-en. Sec. 8690, R. C. M. 1921. Cal. Civ. C. Sec. 3337. Field Civ. C. Sec. 1864.

References

Lutey v. Clark, 31 M 45, 54, 77 P 305, 84 P 73; Thornton-Thomas Mercantile Co. v. Bretherton, 32 M 80, 98, 80 P 10.

17-406. (8691) Damages of lienor. One having a mere lien on personal property cannot recover greater damages for its conversion, from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien, and the compensation allowed by section 17-404 for the loss of time and expenses.

History: En. Sec. 4335, Civ. C. 1895; re-en. Sec. 6073, Rev. C. 1907; re-en. Sec. 8691, R. C. M. 1921. Cal Civ. C. Sec. 3338. Field Civ. C. Sec. 1865.

References

Ferrat v. Adamson, 53 M 172, 181, 163 P

Collateral References

Trover and Conversion \$2. 89 C.J.S. Trover and Conversion \$164.

17-407. (8692) Seduction. The damages for seduction rest in the sound discretion of the jury.

History: En. Sec. 4336, Civ. C. 1895; re-en. Sec. 6074, Rev. C. 1907; re-en. Sec. 8692, R. C. M. 1921. Cal. Civ. C. Sec. 3339. Field Civ. C. Sec. 1866.

Cross-References

Right to sue for, secs. 93-2807, 93-2808. Time for commencement of action, two years, sec. 93-2606.

References

Ferrat v. Adamson, 53 M 172, 181, 163 P 112.

Collateral References

Seduction ≈ 18-22. 79 C.J.S. Seduction § 24. 47 Am. Jur. 676, Seduction, § 93 et seq.

Measure and elements of damages recoverable from putative spouse by other for wrongfully inducing entry into or cohabitation under illegal, void, or nonexistent marriage. 72 ALR 2d 994.

17-408. (8693) Injuries to animals. For wrongful injuries to animals, being subjects of property, committed willfully or by gross negligence, in disregard of humanity, exemplary damages may be given.

History: En. Sec. 4337, Civ. C. 1895; re-en. Sec. 6075, Rev. C. 1907; re-en. Sec. 8693, R. C. M. 1921. Cal. Civ. C. Sec. 3340. Field Civ. C. Sec. 1867.

Exemplary Damages

In an action for damages resulting from collision of plaintiffs' logging truck with defendant's cattle, in which defendant cross-complained for loss of cattle and exemplary damages, an award of \$2,500 exemplary damages for loss of twenty head of cattle was not improper. Franck v. Hudson, 140 M 480, 373 P 2d 951, 954. Under this section it is within the

province of the jury to fix the amount of

exemplary damages and the supreme court will not interfere with such a determination unless it appears to have been influenced by passion, prejudice, or some improper motive. Franck v. Hudson, 140 M 480, 373 P 2d 951, 954.

Collateral References

Animals@44, 85; Damages@91 (1). 3 C.J.S. Animals § 234; 25 C.J.S. Damages § 123. 4 Am. Jur. 2d 396, Animals, § 146.

Measure and elements of damages for killing or injuring dog. 1 ALR 3d 997.

17-409. Liability of owner of vicious dog. The owner of any dog which shall without provocation bite any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dog, and located within an incorporated city or town, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

A person is lawfully upon the private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States of America, or when he is on such property as an invitee or licensee of the person lawfully in possession of the property.

History: En. Sec. 1, Ch. 113, L. 1943.

17-410. Emergency care rendered at scene of accidents. Any person licensed as a physician and surgeon under the laws of the state of Montana, or any other person, who in good faith renders emergency care or assistance, without compensation, at the scene of an emergency or accident, shall not be liable for any civil damages for acts or omissions other than damages occasioned by gross negligence or by willful or wanton acts or omissions by such person in rendering such emergency care.

History: En. Sec. 1, Ch. 93, L. 1963.

CHAPTER 5

PENAL DAMAGES

Section 17-501. Failure to quit, after notice. 17-502. Tenant willfully holding over.

17-503. Injuries to trees, etc.

17-504. Injuries inflicted in a duel—support of family of injured person. 17-505. Injuries inflicted in a duel-payment of debts of injured person.

17-501. (8694) Failure to quit, after notice. If any tenant gives notice of his intention to guit the premises, and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during the time he continues in possession after such notice.

History: En. Sec. 4350, Civ. C. 1895; re-en. Sec. 6076, Rev. C. 1907; re-en. Sec. 8694, R. C. M. 1921. Cal. Civ. C. Sec. 3344.

References

Kester v. Amon, 81 M 1, 13, 261 P 288.

Collateral References

Landlord and Tenant@129 (4). 51 C.J.S. Landlord and Tenant § 315.

Measure of damages for tenant's failure to surrender possession of rented premises. 32 ALR 2d 582.

17-502. (8695) Tenant willfully holding over. If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and one month's notice, in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice.

History: En. Sec. 4351, Civ. C. 1895; re-en. Sec. 6077, Rev. C. 1907; re-en. Sec. 8695, R. C. M. 1921. Cal. Civ. C. Sec. 3345.

Purchaser at Void Foreclosure Sale Held Not Liable in Treble Damages in Absence of Notice

Where a mortgagee bank purchased the property at foreclosure sale, void because mortgage subsequently declared void, during the time it had possession received some income therefrom, such income may be deducted from its claim against the estate for moneys it loaned it to pay costs of administration, for which debt the

mortgage had been given to secure the loan, but could not be held for treble damages under this section for "holding over" in the absence of proof of the required notice (not finding it necessary to consider the feasibility of whether appellant's landlord-tenant theory applies to purchasers under void forcelosure sales). In re Anderson's Estate, 113 M 125, 129, 122 P 2d 832.

References

Kester v. Amon, 81 M 1, 13, 261 P 288; Anderson v. Commercial Credit Co., 110 M 333, 338, 101 P 2d 367.

17-503. (8696) Injuries to trees, etc. For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damage is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment.

History: En. Sec. 4352, Civ. C. 1895; re-en. Sec. 6078, Rev. C. 1907; re-en. Sec. 8696, R. C. M. 1921. Cal. Civ. C. Sec. 3346. Field Civ. C. Sec. 1871.

Timber Cut from Mining Claim

In an action for trespass brought under this section to recover for timber wrongfully cut from a mining claim, where the evidence was sufficient to sustain a finding for \$900 actual damages sustained, a general verdict for plaintiff for \$2,700, reasonably construed in view of the instruction of the court that under this section the jury could treble the damages if the trespass was willful, held in effect a finding that the actual detriment sustained was \$900 and that the jury trebled the damages in the belief that the trespass was willful. Tripp v. Silver Dyke Min. Co., 70 M 120, 128, 224 P 272.

References

Thompson v. Mattuschek, 134 M 500, 333 P 2d 1022, 1027.

Collateral References

Trespass \$\infty 61.

87 C.J.S. Trespass §§ 135-138.

17-504. (8697) Injuries inflicted in a duel—support of family of injured person. If any person slays or permanently disables another person in a duel in this state, the slayer must provide for the maintenance of the widow or wife of the person slain or permanently disabled, and for the

minor children, in such manner and at such cost, either by aggregate compensation in damages to each, or by a monthly, quarterly, or annual allowance, to be determined by the court.

History: En. Sec. 4353, Civ. C. 1895; reen. Sec. 6079, Rev. C. 1907; re-en. Sec. 8697, R. C. M. 1921. Cal. Civ. C. Sec. 3347.

Collateral References

Assault and Battery 40; Death 14 (1), 78.

6 C.J.S. Assault and Battery § 56; 25A C.J.S. Death §§ 23, 95.

17-505. (8698) Injuries inflicted in a duel—payment of debts of injured person. If any person slays or disables another person in a duel in this state, the slayer is liable for and must pay all debts of the person slain or permanently disabled.

History: En. Sec. 4354, Civ. C. 1895; re-en. Sec. 6080, Rev. C. 1907; re-en. Sec. 8698, R. C. M. 1921. Cal. Civ. C. Sec. 3348.

CHAPTER 6

VALUE—HOW ESTIMATED—LIMITATIONS OF DAMAGES

Section 17-601. Repealed.

17-602. Repealed.

17-603. Property of peculiar value. 17-604. Value of thing in action.

17-605. Damages allowed in this chapter, exclusive of others.

17-606. Limitation of damages. 17-607. Damages to be reasonable.

17-608. Nominal damages. 17-609. Nominal damages

17-609. Nominal damages only in certain suits against county commissioners.

17-601, 17-602. (8699, 8700) Repealed—Chapter 264, Laws of 1963.

Repeal

These sections (Secs. 4360, 4361, Civ. C. 1895), relating to the measure of dam-

ages in actions involving personal property, were repealed by Sec. 10-102, Ch. 264, Laws 1963.

17-603. (8701) Property of peculiar value. Where a certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer.

History: En. Sec. 4362, Civ. C. 1895; re-en. Sec. 6083, Rev. C. 1907; re-en. Sec. 8701, R. C. M. 1921. Cal. Civ. C. Sec. 3355. Field Civ. C. Sec. 1874.

Damages to Purchaser

This section and section 17-306 must be construed together in determining damages in a case where the property of which the buyer is deprived has a peculiar value to him. Orford v. Topp, 136 M 227, 346 P 2d 566, 569.

Deprivation of Property

Similar statutes have been held applicable to cases involving damage to property in which an individual has had an interest or possession, or has made special use thereof over a period of time, and in which the property has acquired a value

which was peculiar to that individual alone, and where a measure of damages based on market value would be manifestly inadequate. Orford v. Topp, 136 M 227, 346 P 2d 566, 569.

Insufficient Evidence of Peculiar Value

Where there was no evidence to show any peculiar value to the plaintiffs in the property of which they were deprived, a verdict in excess of the difference between the price which the purchasers agreed to pay and the price for which the property was sold by the vendor was not supported. Orford v. Topp, 136 M 227, 346 P 2d 566, 569.

Collateral References

Damages \$25 C.J.S. Damages § 88.

17-604. (8702) Value of thing in action. For the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles the owner.

History: En. Sec. 4363, Civ C. 1895; re-en. Sec. 6084, Rev. C. 1907; re-en. Sec. 8702, R. C. M. 1921, Cal Civ. C. Sec. 3356. Based on Field Civ. C. Sec. 1875.

Collateral References

Damages \$ 163 (4). 25 C.J.S. Damages § 144.

17-605. (8703) Damages allowed in this chapter, exclusive of others. The damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned.

History: En. Sec. 4364, Civ. C. 1895; re-en. Sec. 6085, Rev. C. 1907; re-en. Sec. 8703, R. C. M. 1921. Cal. Civ. C. Sec. 3357. Field Civ. C. Sec. 1876.

Collateral References
Damages \$\infty\$87 (1).
25 C.J.S. Damages \{ 117.

17-606. (8704) Limitation of damages. Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the chapters on exemplary damages, penal damages, and in sections 17-319, 17-407 and 17-408.

History: En. Sec. 4365, Civ. C. 1895; re-en. Sec. 6086, Rev. C. 1907; re-en. Sec. 8704, R. C. M. 1921. Cal. Civ. C. Sec. 3358. Field Civ. C. Sec. 1877.

Compiler's Note

Section 17-319, referred to in this section, was repealed by Sec. 7, Ch. 200, Laws 1963.

References

Clifton v. Willson, 47 M 305, 310, 132

P 424; State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 61 M 215, 230, 201 P 687; Borgeas v. Oregon Short Line R. Co., 73 M 407, 423, 236 P 1069; Sample v. Murray Hospital, 103 M 195, 200, 62 P 2d 241.

Collateral References

Damages \$31. Damages \$73.

17-607. (8705) Damages to be reasonable. Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

History: En. Sec. 4366, Civ. C. 1895; re-en. Sec. 6087, Rev. C. 1907; re-en. Sec. 8705, R. C. M. 1921. Cal. Civ. C. Sec. 3359. Field Civ. C. Sec. 1878.

References

State ex rel Broadwater Farms Co. v. Broadwater Elevator Co., 61 M 215, 231, 201 P 687.

Collateral References

Damages 1 et seq. 25 C.J.S. Damages § 1.

Changes in cost of living or in purchasing power of money as affecting damages, for personal injuries or death. 12 ALR 2d 61.

Loss of profits in a business in which plaintiff is interested as a factor in determining damages for impairment of earning capacity in action for personal injuries. 12 ALR 2d 288.

Adequacy of damages in action by person injured for personal injuries not resulting in death (for years 1941 to 1950). 16 ALR 2d 393.

Adequacy of damages for personal injuries resulting in death of adult (for years 1941 to 1950). 17 ALR 2d 832.

Propriety of taking income tax liability in due consideration and fixing damages for impairment of earning power. 63 ALR 2d 1393.

17-608. (8706) Nominal damages. When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.

History: En Sec. 4367, Civ. C. 1895; re-en. Sec. 6088, Rev. C. 1907; re-en. Sec. 8706, R. C. M. 1921. Cal. Civ. C. Sec. 3360. Field Civ. C. Sec. 1879.

References

Fauver v. Wilkoske, 123 M 228, 211 P 2d 420, 423, 17 ALR 2d 518.

Collateral References

Damages \$\sim 8. 25 C.J.S. Damages § 8. 22 Am. Jur. 2d 20, Damages, § 5.

Nominal damages as recoverable in action of trespass by tenant against stranger wrongfully interfering with his possession. 12 ALR 2d 1210.

Nominal damages in action for tenant's failure to surrender possession of rented premises. 32 ALR 2d 611.

Nominal damages as recoverable for attorney's negligence with respect to main-tenance or prosecution of litigation or appeal. 45 ALR 2d 69.

Nominal damages for conversion or loss of commercial paper. 85 ALR 2d 1349.

17-609. (8706.1) Nominal damages only in certain suits against county commissioners. In civil actions against boards of county commissioners or members thereof to recover damages for personal injuries arising out of or from breach of duty relative to the condition of roads, highways or bridges, only nominal damages shall be recovered unless it be established by the evidence that the action or nonaction complained of was a willful or a gross neglect of duty.

History: En. Sec. 1, Ch. 153, L. 1939.

11 C.J.S. Bridges § 98; 40 C.J.S. Highways § 282; 60 C.J.S. Motor Vehicles § 233.

Collateral References

Automobiles 313; Bridges 46 (7); Highways©212.

CHAPTER 7

SPECIFIC RELIEF—PURCHASES OF PROPERTY

Section 17-701. Specific relief, etc.—when allowed.

17-702. Specific relief-how given. 17-703. Preventive relief-how given.

Not to enforce penalty, etc.

Judgment for possession or title to real property. Judgment for delivery of personal property. 17-705.

17-706. 17-707. When holder may be compelled to deliver.

17-701. (8707) Specific relief, etc.—when allowed. Specific or preventive relief may be given in the cases specified in sections 17-702 to 17-1101 and in no others.

History: En. Sec. 4380, Civ. C. 1895; re-en. Sec. 6089, Rev. C. 1907; re-en. Sec. 8707, R. C. M. 1921. Cal. Civ. C. Sec. 3366. Field Civ. C. Sec. 1880.

Collateral References

Judgment € 4. 49 C.J.S. Judgments § 6.

17-702. (8708) Specific relief—how given. Specific relief is given:

- 1. By taking possession of a thing, and delivering it to a claimant:
- By compelling the party himself to do that which ought to be done: or.
- By declaring and determining the rights of parties, otherwise than by an award of damages.

History: En. Sec. 4381, Civ. C. 1895; re-en. Sec. 6090, Rev. C. 1907; re-en. Sec. 8708, R. C. M. 1921. Cal. Civ. C. Sec. 3367. Field Civ. C. Sec. 1881.

5; Judgment 4; Replevin 1; Specific Performance 1.

1 C.J.S. Actions §§ 17, 18; 43 C.J.S. Injunctions § 5; 77 C.J.S. Replevin § 2; 81 C.J.S. Specific Performance § 1.

Collateral References

Declaratory Judgment 1; Injunction

17-703. (8709) Preventive relief — how given. Preventive relief is given by prohibiting a party from doing that which ought not to be done.

History: En. Sec. 4382, Civ. C. 1895; reen. Sec. 6091, Rev. C. 1907; re-en. Sec. 8709, R. C. M. 1921. Cal. Civ. C. Sec. 3368. Field Civ. C. Sec. 1882.

Collateral References

Injunction ← 1; Judgment ← 4. 43 C.J.S. Injunctions §§ 1, 12; 49 C.J.S. Judgments § 6.

17-704. (8710) Not to enforce penalty, etc. Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce the penalty or forfeiture in any case.

History: En. Sec. 4383, Civ. C. 1895; re-en. Sec. 6092, Rev. C. 1907; re-en. Sec. 8710, R. C. M. 1921. Cal. Civ. C. Sec. 3369. Field Civ. C. Sec. 1883.

Unlicensed Photographers

The taking of photographs, either by licensed or unlicensed photographers, not being a nuisance, an injunction could not be had to prevent the activities of unlicensed photographers. Montana State Board of Examiners in Photography v. Keller, 120 M 364, 185 P 2d 503, 506.

When Injunctive Relief May Be Granted

Though a court of equity has no criminal jurisdiction, where a penalty is provided by a statute for a violation of its provisions, such as the eight-hour law relating to workmen in underground mines, where there is some interference, actual or threatened, with property or other per-

sonal rights, equity may grant injunctive relief nothwithstanding the employer may thereafter be punished criminally for the infringement of such rights. Contention that plaintiff employees are estopped from seeking relief because in pari delicto with defendant company, held not meritorious. Butte Miners' Union No. 1 v. Anaconda Copper Min. Co., 112 M 418, 435, 118 P 2d 148.

When Injunctive Relief May Not Be Granted

Injunction is an equitable remedy, and as a general rule a court of equity will take no part in the administration of the criminal law and may not enjoin either the commission of crimes or their prosecution and punishment. State ex rel. Stewart v. District Court, 77 M 361, 370, 251 P 137.

17-705. (8711) Judgment for possession or title to real property. A person entitled to specific real property, by reason either of a perfected title, or of a claim to title which ought to be perfected, may recover the same in the manner prescribed by Title 93, either by a judgment for its possession, to be executed by the sheriff, or by a judgment requiring the other party to perfect the title, and to deliver possession of the property.

History: En. Sec. 4390, Civ. C. 1895; re-en. Sec. 6093, Rev. C. 1907; re-en. Sec. 8711, R. C. M. 1921. Cal. Civ. C. Sec. 3375. Field Civ. Sec. 1884.

References

Doggett v. Johnson, 82 M 338, 348, 267 P 292.

Collateral References
Ejectment = 114; Judgment = 4.

28 C.J.S. Ejectment § 115; 49 C.J.S. Judgments § 6.

17-706. (8712) Judgment for delivery of personal property. A person entitled to the immediate possession of specific personal property may recover the same in the manner provided by Title 93.

History: En. Sec. 4400, Civ. C. 1895; re-en. Sec. 6094, Rev. C. 1907; re-en. Sec. 8712, R. C. M. 1921. Cal. Civ. C. Sec. 3379. Field Civ. C. Sec. 1885.

References

Kramlich v. Tullock, 84 M 601, 606, 277 P 411.

17-707. (8713) When holder may be compelled to deliver. Any person having the possession or control of a particular article of personal property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession.

History: En. Sec. 4401, Civ. C. 1895; re-en. Sec. 6095, Rev. C. 1907; re-en. Sec. 8713, R. C. M. 1921. Cal. Civ. C. Sec. 3380. Based on Field Civ. C. Sec. 1886.

References

Stiemke v. Jankovich, 68 M 60, 63, 217

P 650; Kramlich v. Tullock, 84 M 601, 606, 277 P 411.

Collateral References

Replevin 2. 77 C.J.S. Replevin § 2.

CHAPTER 8

SPECIFIC RELIEF—PERFORMANCE OF OBLIGATIONS

Section 17-801. In what cases compelled.

Remedy mutual.

17-802. 17-803. No remedy unless mutual.

17-804. Distinction between real and personal property.

17-805. Contract signed by one party only, may be enforced by others. 17-806. Liquidation of damages not a bar to specific performance.

17-807. What cannot be specifically enforced.

What parties cannot be compelled to perform. 17-808.

What parties cannot have specific performance in their favor. 17-809.

17-810. Specific performance not required when oppressive. Agreement to sell property by one who has no title. 17-811.

17-812. Relief against parties claiming under the person bound to perform.

17-801. (8714) In what cases compelled. Except as otherwise provided in sections 17-702 to 17-1101, the specific performance of an obligation may be compelled:

1. When the act to be done is in the performance, wholly or partly, of an express trust;

2. When the act to be done is such that pecuniary compensation for its nonperformance would not afford adequate relief;

3. When it would be extremely difficult to ascertain the actual damage caused by the nonperformance of the act to be done; or,

4. When it has been expressly agreed, in writing, between the parties to the contract, that specific performance thereof may be required by either party, or that damages shall not be considered adequate relief.

History: En. Sec. 4410, Civ. C. 1895; re-en. Sec. 6096, Rev. C. 1907; re-en. Sec. 8714, R. C. M. 1921. Cal. Civ. C. Sec. 3384. Field Civ. C. Sec. 1887.

Inadequate Relief by Pecuniary Com-

Where complaint alleged breach of a contract to convey land described therein, it was sufficient to raise the presumption that pecuniary compensation would not afford adequate relief, within subdivision 2 of this section, though there was no allegation of special circumstances showing that plaintiff had no adequate remedy at law. Christiansen v. Aldrich, 30 M 446, 450, 76 P 1007.

Waiver of Invalidity

The objection that a contract in suit is invalid under the statute of frauds is waived where the point that the contract, to be enforceable, must be in writing, was not raised either in the pleadings or by objection to the introduction of evidence. Alley v. Peeso, 88 M 1, 7, 290 P

References

Brubaker v. D'Orazi, 120 M 22, 179 P 2d 538, 544.

Collateral References

Specific Performance 1 et seq., 25 et seq.

81 C.J.S. Specific Performance §§ 1 et seq., 30.

Specific performance: Compensation or damages awarded purchaser for delay in conveyance of land. 7 ALR 2d 1204.

17-802. (8715) Remedy mutual. When either of the parties to an obligation is entitled to a specific performance thereof, according to the provisions of the last section, the other party is also entitled to it, though not within those provisions.

History: En. Sec. 4411, Civ. C. 1895; re-en. Sec. 6097, Rev. C. 1907; re-en. Sec. 8715, R. C. M. 1921. Cal. Civ. C. Sec. 3385. Field Civ. C. Sec. 1888.

Application of Section

Under this section, when either of the parties to an obligation is entitled to specific performance, the other party is also entitled to it, the remedy being mutual. Saint v. Beal, 66 M 292, 295, 213 P 248.

Under this section, the vendor of land under a contract giving him the privilege to declare all of the deferred payments immediately due upon failure to make any one of them, may maintain an action against the vendee to compel specific performance of the contract on his part by paying the balance of the purchase price. Saint v. Beal, 66 M 292, 295, 213 P 248.

References

Kofoed v. Bray, 69 M 78, 83, 220 P 532; Conner v. Helvik, 105 M 437, 455, 73 P 2d 541.

Collateral References

Specific Performance 5.

8Î C.J.S. Specific Performance §§ 10, 11. 49 Am. Jur. 46, Specific Performance, § 34 et seq.

17-803. (8716) No remedy unless mutual. Neither party to any obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely, or nearly so, together with full compensation for any want of entire performance.

History: En. Sec. 4412, Civ. C. 1895; re-en. Sec. 6098, Rev. C. 1907; re-en. Sec. 8716, R. C. M. 1921. Cal. Civ. C. Sec. 3386. Field Civ. C. Sec. 1889.

Application of Section

As a general rule of equity, a contract will not be specifically enforced unless there is mutuality of obligation and remedy, i. e., where one of the parties is not bound by the contract, he cannot call upon the court to compel specific performance by the other party, which rule is substantially embodied in this section. Templeton v. Williard, 83 M 317, 321, 272 P 522, distinguished in 127 M 222, 230, 258 P 2d 960.

Where plaintiff after agreeing with defendant that he would put up money to purchase a gas and oil lease, but did not put it up, he could not compel the defendant to transfer a half interest in the lease since to be entitled to specific performance he must show that he has performed his part of the agreement. McDonald v. Stewart, 127 M 188, 259 P 2d 799.

Where plaintiff has done everything under the contract except to issue and deliver the certificates of stock to defendant and this can be specifically enforced, this section does not prevent plaintiff from specific performance to compel defendant to assign an oil and gas lease which was entered into. Bull Creek Oil & Gas Development v. Bethel, 127 M 222, 258 P 2d 960, 963.

Exchange of Land

Where a party seeking specific performance of an agreement for an exchange of land tendered a deed and offered to do equity, the remedy became mutual, the fact that when the agreement was made the element of mutuality may have been absent then becoming immaterial. Hogan v. Thrasher, 72 M 318, 329, 233 P 607.

Option To Repurchase

Want of mutuality did not preclude specific enforcement of written option to repurchase liquor business, where defendant's obligation under decree was conditioned upon payment by plaintiff of amounts found by the court to be due defendant. Brubaker v. D'Orazi, 120 M 22, 179 P 2d 538, 544.

Reconveyance of Realty

Where plaintiff conveyed real property to his partner to be used in the partnership business under the condition that the partner assume certain mortgage payments, and if he failed to do so, plaintiff would be entitled to again become the sole owner of the property and the partner entitled to repayment of the money he invested in the business, a decree awarding specific performance by reconveyance of the realty, conditioned that plaintiff mortgage all the partnership property to secure defendant's refund under his counter claim, the court finding that a money judgment against plaintiff would probably be uncollectible, was sustained by the evidence. Hall v. Lommasson, 113 M 272, 278, 124 P 2d 694.

Sale of Mining Property

Vendee of a contract for the sale of mining property cannot compel specific performance by the vendor, where the contract called for the vendee to deposit a specific amount of cash in the bank, and the vendee had not done so. Sidwell v. The New Mine Sapphire Syndicate, 130 M 189, 297 P 2d 299, 303. (Dissenting opinion, 130 M 189, 297 P 2d 299, 303.)

Waiver of Performance

Unless performance is waived or excused, a plaintiff seeking to enforce a contract must perform his obligations there-under, and plaintiff's willful violation of an essential convenant of a contract is a defense to specific enforcement of the contract. McDonald v. Stewart, 127 M 188, 259 P 2d 799, 805.

References

Finlen v. Heinze, 32 M 354, 386, 80 P 918; Kofoed v. Bray, 69 M 78, 83, 220 P 532; Conner v. Helvik, 105 M 437, 455, 73 P 2d 541; Steen v. Rustad, 132 M 96, 313 P 2d 1014, 1018.

Collateral References

Specific Performance 32 (1). 81 C.J.S. Specific Performance § 10.

17-804, (8717) Distinction between real and personal property. It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved.

History: En. Sec. 4413, Civ. C. 1895; re-en. Sec. 6099, Rev. C. 1907; re-en. Sec. 8717, R. C. M. 1921. Cal. Civ. C. Sec. 3387. Field Civ. C. Sec. 1890.

Application of Section

Under this section, it is presumed that the breach of an agreement to sell or exchange land cannot be adequately compensated in damages, and where the court on ample evidence found that plaintiff in his action for specific performance could not be made whole by damages, the contention that specific performance should not have been decreed has no merit. However, the content of the co gan v. Thrasher, 72 M 318, 329, 233 P 607.

Where defendant vendee in a suit seeking specific performance introduced no evidence in opposition to the presumption declared by this section, he was in no position to contend on appeal that the vendor had an adequate remedy at law by a suit for damages. Conner v. Helvik, 105 M 437, 455, 73 P 2d 541.

Rebuttable Presumption

The presumption that breach of agreement to transfer personal property can be adequately relieved by pecuniary compensation is rebuttable and was overcome by trial court's express finding to the contrary in action for specific performance of written option to repurchase retail liquor

business. Brubaker v. D'Orazi, 120 M 22, 179 P 2d 538, 544.

Sufficiency of Complaint

In an action for the specific performance of a contract for the sale of lands, it is not necessary for the complaint to allege that the plaintiff has no complete or adequate remedy at law in damages. Ide v. Leiser, 10 M 5, 15, 24 P 695; Christiansen v. Aldrich, 30 M 446, 451, 76 P 1007; Lowery v. Cole, 47 M 64, 68, 130 P

It is not necessary, in an action for the specific performance of a contract for the sale of real property, for the plaintiff, asking for a preliminary injunction, to allege that he has no adequate remedy at law; when it appears that the defendant has refused to comply with his contract, the presumption attaches that the plaintiff has suffered detriment, which is irreparable in an action for damages; he is, therefore, prima facie entitled to invoke the aid of equity to obtain equitable relief, namely, the performance of the contract. Ide v. Leiser, 10 M 5, 15, 24 P 695; Christiansen v. Aldrich, 30 M 446, 451, 76 P 1007; Lowery v. Cole, 47 M 64, 68, 130 P 410.

Collateral References

Specific Performance \$\infty\$63-72, 119. 81 C.J.S. Specific Performance §§ 62, 140.

17-805. (8718) Contract signed by one party only, may be enforced by others. A party who has signed a written contract may be compelled specifically to preform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance.

History: En. Sec. 4414, Civ. C. 1895; 8718, R. C. M. 1921. Cal. Civ. C. Sec. 3388. re-en. Sec. 6100, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1891.

References

Johnson v. Elliot, 123 M 597, 218 P 2d 703, 707.

Collateral References

Specific Performance 77, 32 (1). 81 C.J.S. Specific Performance §§ 13, 23.

17-806. (8719) Liquidation of damages not a bar to specific performance. A contract otherwise proper to be specifically enforced may be thus enforced, though a penalty is imposed, or the damages are liquidated for its breach, and the party in default is willing to pay the same.

History: En. Sec. 4415, Civ. C. 1895; re-en. Sec. 6101, Rev. C. 1907; re-en. Sec. 8719, R. C. M. 1921. Cal. Civ. C. Sec. 3389. Field Civ. C. Sec. 1892.

Collateral References

Specific Performance 558.
81 C.J.S. Specific Performance § 51.
49 Am. Jur. 57, Specific Performance, § 43-45.

17-807. (8720) What cannot be specifically enforced. The following obligations cannot be specifically enforced:

- 1. An obligation to render personal service, or to employ another therein;
 - 2. An agreement to marry or live with another;
 - 3. An agreement to submit a controversy to arbitration;
- 4. An agreement to perform an act which the party has not power to perform lawfully when required to do so:
- 5. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or
- 6. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

History: En. Sec. 4416, Civ. C. 1895; re-en. Sec. 6102, Rev. C. 1907; re-en. Sec. 8720, R. C.M. 1921. Cal. Civ. C. Sec. 3390. Field Civ. C. Sec. 1893.

Certainty and Completeness of Contract

An agreement to enter into an agreement upon terms to be afterward settled between the parties cannot, as a general rule, be enforced. Long v. Needham, 37 M 408, 423, 96 P 731, distinguished in 101 M 482, 487, 54 P 2d 879; Monahan v. Allen, 47 M 75, 80, 130 P 768; Livingston Water-Works v. City of Livingston, 53 M 1, 10, 162 P 381.

A writing acknowledging receipt of a sum of money in part payment "for ranch of 200 acres (describing it by section, township and range), water rights of located 1869 and 1871. If not as I say and represent the money to be returned," intended by the parties as the basis for future negotiations and superseded by a formal deed executed a few days later, was incapable of specific performance because too indefinite and lacking in mutuality. Kofoed v. Bray, 69 M 78, 83, 220 P 532.

Before a decree of specific performance may be awarded, the contract sought to be specifically performed must, under subdivision 6 of this section, not only be certain but also complete. Reeves v. Littlefield, 101 M 482, 486, 54 P 2d 879.

Absolute certainty and completeness in every detail is not a prerequisite of specific performance, only reasonable certainty and completeness being required. Steen v. Rustad, 132 M 96, 313 P 2d 1014, 1020.

A contract to be specifically enforced must be complete and certain in all essential matters included within its scope. Nothing must be left to conjecture or surmise, or be so vague as to make it impossible for the court to glean the intent of the parties from the instrument, or the acts sought to be enforced. Steen v. Rustad, 132 M 96, 313 P 2d 1014, 1020.

Those matters which are merely subsidiary, collateral or which go to the performance of the contract are not essential, and therefore need not be expressed in the informal agreement. Steen v. Rustad, 132 M 96, 313 P 2d 1014, 1020.

Lease with Option To Buy

Plaintiff was entitled to specific performance of agreement by which defendants gave plaintiff an exclusive option to purchase land under the existing lease for \$8,500; plaintiff's method of exercising the option was to pay defendants \$1,500 before November 1, 1951; that sum would constitute the down payment on the property; payment of the balance was provided for by the plaintiff delivering to the defendants two-thirds of the

crop raised each year, such crop share to cover the payment due and owing on the contract for that year; and it was further provided that the plaintiff was to summer fallow forty-five acres of land during the year 1951. Steen v. Rustad, 132 M 96, 313 P 2d 1014, 1020, 1021.

References

In re Grogan's Estate, 38 M 540, 542, 100 P 1044; Sanger v. Huguenel, 65 M 236, 243, 211 P 349.

Collateral References

Specific Performance 25 et seq. 81 C.J.S. Specific Performance § 30.

17-808. (8721) What parties cannot be compelled to perform. Specific performance cannot be enforced against a party to a contract in any of the following cases:

- 1. If he has not received an adequate consideration for the contract;
- 2. If it is not, as to him, just and reasonable;
- 3. If his assent was obtained by the misrepresentations, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; or,
- 4. If his assent was given under the influence of mistake, misapprehension, or surprise, except that where the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced.

History: En. Sec. 4417, Civ. C. 1895; re-en. Sec. 6103, Rev. C. 1907; re-en. Sec. 8721, R. C. M. 1921. Cal. Civ. C. Sec. 3391. Field Civ. C. Sec. 1894.

Consideration

A party seeking specific performance of a contract is required to set forth the consideration therefor, and the burden of proof that such consideration is inadequate is on the party resisting specific performance. Finlen v. Heinze, 28 M 548, 563, 73 P 123.

Where complainant's entry on defendant's land for the purpose of locating a mining claim was wholly ineffectual as against defendant for that purpose, a contract by which complainants agreed to transfer to defendant an undivided one-third interest in the lead or lode, in consideration of defendant's transfer to plaintiffs of an undivided two-thirds interest therein, together with the necessary amount of real estate covered by the location, etc., in settlement of the rights of the parties without litigation, was not based on a sufficient consideration to support a suit for specific performance under subdivision 1 of this section. Traphagen v. Kirk, 30 M 562, 574, 77 P 58.

Defenses to Specific Performance

The evident meaning of this section is that any one of these subdivisions furnishes a defense to an action for specific performance. In other words, when specific performance is sought against a party, he may interpose any one of the

defenses named above, and if he can maintain it, he defeats the action. The burden of proof as to such defense is upon him who asserts it. Finlen v. Heinze, 28 M 548, 563, 73 P 123; In re Grogan's Estate, 38 M 540, 542, 100 P 1044.

Just and Reasonable

In an action for specific performance of a contract of sale made by a receiver appointed in a mortgage foreclosure, the court must look to the real parties in interest and refuse relief if the contract was not just and reasonable, or if performance would operate more harshly upon the parties than its refusal would upon the plaintiff seeking performance. Interior Securities Co. v. Campbell, 55 M 459, 469, 178 P 582.

Negative Statements Need Not Be Avoided

All the negative statements in this section need not be avoided in a petition to compel an executor or administrator to convey, under section 91-3301. In re Grogan's Estate, 38 M 540, 542, 100 P 1044.

References

Babcock v. Engel, 58 M 597, 604, 194 P 137; Saint v. Beal, 66 M 292, 297, 213 P 248.

Collateral References

Specific Performance 49.
81 C.J.S. Specific Performance 39 et seq.

17-809. (8722) What parties cannot have specific performance in their favor. Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated; in which case specific performance may be compelled, upon full compensation being made for the default.

History: En. Sec. 4418, Civ. C. 1895; re-en. Sec. 6104, Rev. C. 1907; re-en. Sec. 8722, R. C. M. 1921. Cal. Civ. C. Sec. 3392. Field Civ. C. Sec. 1895.

Cash Deposit-Failure To Make

Vendee of a contract for the sale of mining property cannot compel specific performance by the vendor, where the contract called for the vendee to deposit a specific amount of cash in the bank and he had not done so. An allegation in the complaint that the vendee had deposited a substantial sum in the bank was not sufficient since the contract called for a spe-

cific amount. Sidwell v. The New Mine Sapphire Syndicate, 130 M 189, 297 P 2d 299, 303. (Dissenting opinion, 130 M 189, 297 P 2d 299, 303.)

References

Hall v. Lommasson, 113 M 272, 284, 124 P 2d 694; Continental Oil Co. v. McNair Realty Co., 137 M 410, 353 P 2d 100, 110.

Collateral References

Specific Performance 17.
81 C.J.S. Specific Performance § 23 et seq.

17-810. (8723) Specific performance not required when oppressive. Specific performance cannot be compelled when it would operate more harshly upon the party required to perform than its refusal would operate upon the party seeking it.

History: En. Sec. 4419, Civ. C. 1895; re-en. Sec. 6105, Rev. C. 1907; re-en. Sec. 8723, R. C. M. 1921. Field Civ. C. Sec. 1896.

References

Interior Securities Co. v. Campbell, 55

M 459, 469, 178 P 582; Hall v. Lommasson, 113 M 272, 284, 124 P 2d 694.

Collateral References

Specific Performance 16.
81 C.J.S. Specific Performance 18 et seq.

17-811. (8724) Agreement to sell property by one who has no title. An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt.

History: En. Sec. 4420, Civ. C. 1895; re-en. Sec. 6106, Rev. C. 1907; re-en. Sec. 8724, R. C. M. 1921. Cal. Civ. C. Sec. 3394. Field Civ. C. Sec. 1897.

References

Milwaukee Land Co. v. Ruesink, 50 M 489, 504, 148 P 396.

17-812. (8725) Relief against parties claiming under the person bound to perform. Whenever an obligation in respect to real property would be specifically enforced against a particular person, it may be in like manner enforced against any other person claiming under him by a title created subsequently to the obligation, except a purchaser or encumbrancer in good faith and for value, and except, also, that any such person may exonerate himself by conveying all his estate to the person entitled to enforce the obligation.

History: En. Sec. 4421, Civ. C. 1895; re-en. Sec. 6107, Rev. C. 1907; re-en. Sec. 8725, R. C. M. 1921. Cal. Civ. C. Sec. 3395. Field Civ. C. Sec. 1898.

Collateral References
Specific Performance=19-24.
81 C.J.S. Specific Performance §§ 26-28.

CHAPTER 9

SPECIFIC RELIEF-REVISION AND RESCISSION OF CONTRACTS

Section 17-901. When contract may be revised.

17-902. Presumption as to intent of parties.

17-903. Principles of revision.

17-904. Enforcement of revised contract. 17-905. When rescission may be adjudged.

17-906. Rescission for mistake.

17-907. Court may require party rescinding to do equity.

17-901. (8726) When contract may be revised. When, through fraud or a mutual mistake of the parties, or a mistake of one party, while the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

History: En. Sec. 4430, Civ. C. 1895; re-en. Sec. 6108, Rev. C. 1907; re-en. Sec. 8726, R. C. M. 1921. Cal. Civ. C. Sec. 3399. Field Civ. C. Sec. 1899.

Assignment of Royalty Interest

Where a landowner, induced by the fraud of the person with whom he was contracting, assigned a 1/32 royalty interest instead of an undivided 1/32 interest in and to minerals under and upon his lands, the assignment will be reformed, amended, and corrected by the courts to correctly embody the agreement of the parties. Carroll v. Funk, 222 F 2d 508, 511.

Burden of Proof

The party who seeks to revise or reform a written instrument on the ground of a mutual mistake of the parties, has the burden of establishing such mistake by clear, convincing and satisfactory evidence if he would overcome the presumption that the writing contains their final agreement and expresses their real purpose and intent. August v. Burns, 79 M 198, 218, 255 P 737.

Defect in Complaint Cured by Answer

Where defendant by his answer and cross complaint alleged that he was a purchaser of the land in good faith for value and without notice of any adverse interest held by plaintiffs and this was denied in reply and answer of plaintiff, defendants supplied the issue of good faith and cannot complain of the absence of an allegation in the complaint that defendant was not a purchaser in good faith. Strack v. Federal Land Bank of Spokane, 124 M 19, 218 P 2d 1052, 1055.

Effect of Negligence on Reformation

The mere fact that a party seeking a reformation of an instrument on the

ground of mistake may himself have been negligent is not a ground for refusing relief; but if the negligence is excusable, as where plaintiff is an old man and not accustomed to transact business and defendant a much younger man of extensive business experience, relief will be granted when, in view of all the circumstances, to deny it would permit plaintiff to suffer a gross wrong at the hands of defendant. Ayers v. Buswell, 73 M 518, 528, 238 P 591.

Under this section, authorizing the reformation of a contract when through mutual mistake it does not truly express the intention of the parties, the court in a mortgage foreclosure suit properly excluded one of a number of lots described by number, where it was apparent that the mortgagor did not intend to include it and the attorney of the mortgagee who drew it, in following the descriptions given in another mortgage, inadvertently added the number of the lot excluded, the circumstances having been such as to excuse the negligence of the mortgagor in failing to read the mortgage before signing it. First State Bank of Philipsburg v. Mussigbrod, 83 M 68, 82, 271 P 695.

Every mistake for which an instrument may be reformed involves the idea of negligence in greater or less degree, and if the negligence in failing to read the instrument is excusable under the circumstances, as where the person charged with negligence was of foreign extraction unable to read English well, and no rights of innocent third persons are involved, reformation may be had. Bitter Root Creamery Co. v. Muntzer, 90 M 77, 87, 300 P 251.

Essentials for Reformation

In an action to reform a contract, the complaint should allege some mistake in the making of the contract, or some mistake or inadvertence in reducing its terms to writing. Gaffney Mercantile Co. v. Hopkins, 21 M 13, 16, 52 P 561.

To warrant reformation of a written instrument for mistake, it must appear that the parties agreed upon a certain contract; that they executed it; that the contract executed was not the one agreed upon; that the variance occurred by mistake; in what the mistake consisted, and that it was mutual. Thielbar Realties, Inc. v. National Union Fire Ins. Co., 91 M 525, 530, 9 P 2d 469.

Proof that failure of contract to express true intention of the parties was the result of fraud, mutual mistake, or a mistake of one party which the other at the time knew or suspected, is necessary to warrant reformation of a written contract. Brubaker v. D'Orazi, 120 M 22, 179 P 2d 538, 542.

Where plaintiff knew that defendant was acting under a mistake with regard to a writing, he was not entitled to revision on the ground of mistake. Schillinger v. Huber, 133 M 80, 320 P 2d 346,

Extent of Remedy

The purpose of the equity of reformation is not to make a new agreement, but to establish and perpetuate the true one, and courts cannot insert a provision which was omitted with the consent of the party asking reformation, although such consent was given in reliance on an oral promise of the other party that the omission should not make any difference. Comer-ford v. United States Fidelity & Guaranty Co., 59 M 243, 259, 196 P 984.

Reformation of an instrument will not be decreed on the ground of mistake unless the real intent of the parties is satisfactorily shown and the party seeking the relief was free from culpable negligence. Comerford v. United States Fidelity & Guaranty Co., 59 M 243, 259, 196 P 984, explained in 73 M 518, 527, 238 P 591.

If a party claims that a written contract does not correctly state the true terms of the agreement, he must have it reformed and recover on it as reformed, if at all; but he cannot recover on an oral preceding agreement differing from that which was reduced to writing. Biering v. Ringling, 78 M 145, 155, 252 P 872.

This section provides for the reformation of instruments on the ground of the mutual mistake of the parties. Section 13-706 declares that when through mistake a written contract fails to express the real intention of the parties, such intention is to be regarded and the erroneous part of the writing disregarded. Although a voluntary conveyance is unilateral and, therefore, lacks in mutuality, a court of equity under its inherent power and section 13-706, may grant reformation of a deed evidencing such a conveyance even though the mistake was not mutual. Laundreville v. Mero, 86 M 43, 55, 281 P 749.

Judgment Lien Acquired after Execution of Mortgage No Bar to Reformation

The lien of a judgment is a general one and must yield to all prior equitable titles in others; hence such a lien acquired between the date of the execution of a mortgage and the bringing of an action to reform the instrument and foreclose it as reformed does not stand in the way of granting such relief. Clack v. Clack, 98 M 552, 567, 41 P 2d 32.

Mistake as to Ownership

Where a deed reserved to the grantors the right to all the minerals, subject only to the right of grantee to receive half the royalties, the fact that granters owned the mineral rights on only half the tract conveyed did not furnish ground for reformation in the absence of a showing of mutual mistake as to the extent of the grantor's ownership of minerals. Crawford v. Griffith, 137 M 140, 351 P 2d 223, 225.

Not Exclusive Remedy

Neither the remedy afforded by section 13-903, giving a party to a contract the right to rescind on the ground of fraud, among others, nor that granted by this section, under which he may have the contract reformed on the same ground, is exclusive, each being independent of the other; hence the defrauded party may elect to pursue either remedy. Campana v. Dobry, 69 M 240, 243, 244, 221 P 540.

Reformation Does Not Lie for Unilateral Mistake

Where a mistake in an instrument was unilateral, i. e., made only by one party to it, and not mutual, nor one which the other party by it knew or suspected, reformation did not lie. Comerford v. United States Fidelity & Guaranty Co., 59 M 243, 259, 196 P 984.

When Acquiescence in Contract Destroys Right of Reformation

Under the rule that acquiescence in a contract after learning that it does not represent the actual agreement, destroys the right of reformation, where purchasers of land included in an irrigation district entered into the contract of purchase under alleged false representations by the vendor that the lands were not subject to liens for payment of bonds issued by the district, paid assessments for ten years without protest, they will be held to have acquiesced in the contract, barring the right of reformation. Krueger v. Morris, 110 M 559, 568, 107 P 2d 142.

When Reformation Lies for Mutual Mistake

Before equity will intervene to correct an alleged mutual mistake in a written instrument, the evidence of the mistake must be clear, convincing and satisfactory. Humble v. St. John, 72 M 519, 522, 234 P 475.

Where reformation of a fire insurance policy was sought on the ground of a mutual mistake on the part of the insured and the agent of the insurer relative to the answer to the question in the application whether the building insured stood upon ground not owned by the insured, the evidence showing that plaintiff was unable to read the English language and that he advised the agent that he did not own the land but was assured that the policy "was all right," there was a sufficient showing that the mistake was mutual, within the meaning of this section. Krpan v. Central Federal Fire Ins. Co., 87 M 345, 351, 287 P 217.

The rule declared by this section, that a written contract which through mutual mistake does not truly express the intention of the parties may be reformed, applies to a promissory note executed by the officers of a corporation for a company debt but which by such mistake made it their own obligation instead of their principal's. Bitter Root Creamery Co. v. Muntzer, 90 M 77, 87, 300 P 251.

The mutual mistake for which a written instrument may be reformed must be reciprocal and common to both parties, each alike laboring under the same misconception. Thielbar Realties, Inc. v. Na-

tional Union Fire Ins. Co., 91 M 525, 530, 9 P 2d 469.

Where the parties to a contract agree upon its terms and conditions and through mutual mistake the writing signed by them fails to express their agreement, a court of equity will reform it. Clack v. Clack, 98 M 552, 565, 41 P 2d 32.

Where both parties to a mortgage intended that it should cover all the lands of a livestock company, mortgagor, but stenographer of the mortgagee's attorney who prepared the document, in copying the description of the lands inadvertently omitted a tract of 440 acres of the total of 2,600 and the mistake was not discovered until shortly before commencement of the action to reform the mortgage and enforce it as reformed, the evidence was sufficient to warrant reformation. Clack v. Clack, 98 M 552, 565, 41 P 2d 32.

References

Hogan v. Kelly, 29 M 485, 488, 75 P 81; Baum v. Northern Pacific Ry. Co., 55 M 219, 223, 175 P 872; McDaniel v. Hager-Stevenson Oil Co., 75 M 356, 362, 243 P 582; Whorley v. Patton-Kjose Company, Inc., 90 M 461, 487, 5 P 2d 210; Heinecke v. Scott, 95 M 200, 208, 26 P 2d 167; Whorley v. Koss, 122 M 446, 206 P 2d 809, 811.

Collateral References

Reformation of Instruments©=1 et seq. 76 C.J.S. Reformation of Instruments 8 2.

45 Am. Jur. 591, Reformation of Instruments, § 15.

17-902. (8727) Presumption as to intent of parties. For the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement.

History: En. Sec. 4431, Civ. C. 1895; re-en. Sec. 6109, Rev. C. 1907; re-en. Sec. 8727, R. C. M. 1921. Cal. Civ. C. Sec. 3400. Field Civ. C. Sec. 1900.

Mineral Rights

Grantors seeking reformation of deeds by which they retained portions of landowners' mineral royalties were not entitled to relief where evidence did not show that deeds contained no provision reserving all mineral and leasing rights in grantors. Voyta v. Clonts, 134 M 156, 328 P 2d 655, 661.

Collateral References

Reformation of Instruments ← 43. 76 C.J.S. Reformation of Instruments § 82.

17-903. (8728) Principles of revision. In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

History: En. Sec. 4432, Civ. C. 1895; re-en. Sec. 6110, Rev. C. 1907; re-en. Sec.

8728, R. C. M. 1921. Cal. Civ. C. Sec. 3401. Field Civ. C. Sec. 1901.

References

Parchen v. Chessman, 53 M 430, 437, 164 P 531; Humble v. St. John, 72 M 519, 522, 234 P 475; Ayers v. Buswell, 73 M 518, 528, 238 P 591; August v. Burns, 79 M 198, 218, 25 P 737; Voyta v. Clonts, 134 M 156, 328 P 2d 655, 661.

Collateral References

Reformation of Instruments 21 et seq., 47.

76 C.J.S. Reformation of Instruments $\S~86$ et seq.

17-904. (8729) Enforcement of revised contract. A contract may be first revised and then specifically enforced.

History: En. Sec. 4433, Civ. C. 1895; re-en. Sec. 6111, Rev. C. 1907; re-en. Sec. 8729, R. C. M. 1921. Cal. Civ. C. Sec. 3402. Field Civ. C. Sec. 1902.

Collateral References

Reformation of Instruments \$\infty 48.

76 C.J.S. Reformation of Instruments \$89.

References

Whorley v. Koss, 122 M 446, 206 P 2d 809, 811.

17-905. (8730) When rescission may be adjudged. The rescission of a written contract may be adjudged, on the application of a party aggrieved:

1. In any of the cases mentioned in section 13-903; or,

2. Where the contract is unlawful, for causes not apparent upon its face, and the parties were not equally in fault; or,

3. When the public interest will be prejudiced by permitting it to stand.

History: En. Sec. 4440, Civ. C. 1895; re-en. Sec. 6112, Rev. C. 1907; re-en. Sec. 8730, R. C. M. 1921. Cal. Civ. C. Sec. 3406. Field Civ. C. Sec. 1903.

532, 237 P 521; Whorley v. Patton-Kjose Co., Inc., 90 M 461, 487, 5 P 2d 210.

References

Brundy v. Canby, 50 M 454, 472, 148 P 315; Wilson v. Corcoran, 73 M 529,

Collateral References

Cancellation of Instruments €=3 et seq. 12 C.J.S. Cancellation of Instruments § 14.

17-906. (8731) Rescission for mistake. Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

History: En. Sec. 4441, Civ. C. 1895; re-en. Sec. 6113, Rev. C. 1907; re-en. Sec. 8731, R. C. M. 1921. Cal. Civ. C. Sec. 3407. Field Civ. C. Sec. 1904.

shall be no worse off than before the contract. Brundy v. Canby, 50 M 454, 477, 148 P 315.

Doctrine of Restoration

The whole doctrine of restoration under this section and section 13-905, is equitable, and requires merely that the party against whom rescission is adjudged

Collateral References

Cancellation of Instruments 27. Cancellation of Instruments 27.

13 Am. Jur. 2d 523, Cancellation of Instruments, § 31.

17-907. (8732) Court may require party rescinding to do equity. On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation or restoration to the other which justice may require.

History: En. Sec. 4442, Civ. C. 1895; re-en. Sec. 6114, Rev. C. 1907; re-en. Sec. 8732, R. C. M. 1921. Cal. Civ. C. Sec. 3408. Field Civ. C. Sec. 1905. Allowance of Interest in Discretion of Court as "Justice May Require"

While, under this section, the trial court may, in an action for rescission of a

contract, require the party to whom the relief is granted to make restoration to his opponent, it is not incumbent upon it to allow or disallow interest in accordance with the strict rules of law applying to ordinary transactions, but may allow it to the vendor on certain items and to the vendee on others as "justice may require." Silfvast v. Asplund, 99 M 152, 159, 43 P 2d 452.

Restoration Such as Is Reasonably Possible

The object of this section and section 13-905, requiring one rescinding a contract to make compensation or restoration is to place the other party in statu quo, i. e. to place him in the same position he was in at the time of the execution of the contract, but absolute and literal restoration is not required, it being sufficient if the restoration be such as is reasonably possible or as may be demanded by the equities of the case. O'Keefe v. Routledge, 110 M 138, 146, 103 P 2d 307, 148 ALR 409.

Collateral References

Cancellation of Instruments 59. 12 C.J.S. Cancellation of Instruments § 81.

CHAPTER 10

SPECIFIC RELIEF—CANCELLATION OF INSTRUMENTS

Section 17-1001. When cancellation may be ordered.

17-1002. Instrument obviously void. 17-1003. Cancellation in part.

17-1001. (8733) When cancellation may be ordered. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.

History: En. Sec. 4450, Civ. C. 1895; re-en. Sec. 6115, Rev. C. 1907; re-en. Sec. 8733, R. C. M. 1921. Cal. Civ. C. Sec. 3412. Field Civ. C. Sec. 1906.

Applicable to Oil and Gas Leases

An action to have an oil and gas lease declared terminated and canceled of record for failure of the lessee to commence drilling operations or make the stipulated payment in lieu thereof, is one in equity and falls within the provisions of this section, authorizing cancellation to remove a cloud upon title. McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 M 332, 344, 247 P 166; American Surety Co. of New York v. Butler, 86 M 584, 591, 284 P 1011.

Complaint under This Section Held To State Cause of Action

In an action to cancel instruments claimed to constitute clouds upon the title to mining property, thus preventing plaintiff from obtaining a bidder upon execution sale under a judgment in a mechanics' lien foreclosure proceeding, complaint held insufficient to state a cause of action under this section and section 17-1002 (conceding, but not deciding, that the action could be maintained under those sections), for failure to allege the facts showing the apparent validity of the instruments claimed to constitute clouds as well as the facts showing their invalidity. Heavilin v. O'Connor, 61 M 507, 510, 202 P 1115.

Allegations of the complaint showing that a land contract sought to be canceled was of record, that the purchaser was in possession of the premises and that by its terms the latter was shown to have an equitable interest in them, was sufficient to show that the instrument was of such a character as to constitute it a menace to plaintiff's title if left outstanding. Hammond-Dodson Co. v. Slattery, 67 M 489, 496, 216 P 323.

Distinguished from Action To Quiet

In an action to quiet title under section 93-6203, as distinguished from one brought under this section to remove a cloud on title, the complaint alleging that the defendant claims an adverse estate or interest is sufficient without further defining it, whereas under the latter section the pleader must state facts disclosing the apparent validity of the instrument attacked and its actual invalidity. Slette v. Review Publishing Co., 71 M 518, 521, 522, 230 P 580, explained in 120 M 443, 447, 186 P 2d 879. See also Hopkins v. Walker, 244 U S 486, 490, 61 L Ed 1270, 37 S Ct 711.

Title may be cleared under this section providing for cancellation of instruments aimed at a particular instrument under a

complaint pointing out the specific grounds relied upon to establish invalidity, or section 93-6203 for the purpose of quicting title under which inquiry into the whole title to the property is permissible, the court being given broad powers including that of removing clouds and canceling instruments and where the rule against collateral attack upon judgments does not apply to tax deeds issued under section 84-4151, plaintiff being entitled to introduce evidence of irregularities, defects and omissions as well as the deed itself. Sanborn v. Lewis and Clark County, 113 M 1, 5, 120 P 2d 567.

Purpose of Action under This Section

The purpose of an action brought under this section to have an oil and gas lease declared void and terminated by the failure of the lessee to observe its conditions, is to clear the record of an apparent cloud in the shape of an instrument which has ceased to have any effect but still remains of record, and in such a case the equitable rules as to relief from a forfeiture are not applicable. McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 M 332, 344, 247 P 166.

What Plaintiff Must Show To Justify Cancellation

To justify the cancellation of an instrument under this section and section 17-1002, the plaintiff must show that injury may result to him if the instrument is left outstanding; the court cannot interfere if the instrument is invalid, and its invalidity appears directly or constructively upon its face. Hicks v. Rupp, 49 M 40, 44, 140 P 97.

Where real estate is sold under a deed warranting title against encumbrances, the grantor may, after he has parted with title, maintain suit to have a mortgage, placed on record after he became the owner and of the existence of which he was unaware, canceled of record. Kersten

v. Coleman, 50 M 82, 86, 144 P 1092.

The rule announced in Glacier County v. Schlinski, 90 M 136, 300 P 270, that in attacking a tax deed, the particular defects on which the pleader rolies to defeat the deed must be clearly and specifically pointed out applies to actions brought under this section. Sanborn v.

Lewis and Clark County, 113 M 1, 18, 120 P 2d 567.

The rule, that in a suit to remove a particular cloud from the plaintiff's title, the facts showing that title and the existence and invalidity of the instrument or record sought to be climinated as a cloud are essential parts of the plaintiff's cause of action, and must be alleged in the bill, is the same in respect of suits to remove clouds under this section, as distinguished from suits to quiet title under section 93-6203. Hopkins v. Walker, 244 US 486, 490, 61 L Ed 1270, 37 S Ct 711, distinguished in 103 F 2d 551, 552.

When Insufficient To Admit Cancellation

Where plaintiff in his action to remove a cloud from the title to property had based his cause of action upon the levy of a writ of attachment, his contention on appeal that the writ was improperly levied and therefore constituted no lien upon the property deprives him of the relief asked for, since if it constituted no lien it cast no cloud which needed removal. Newman v. Northern Montana Assn. of Credit Men, 63 M 545, 554, 208 P 914. Complaint in an action to remove a

Complaint in an action to remove a cloud from the title to real property was fatally defective for failure to state facts sufficient to disclose the apparent validity of the instrument attacked and its actual invalidity. Poulos v. Lyman Bros. Co., 63 M 561, 566, 208 P 598, distinguished in 71 M 518, 521, 230 P 580.

References

Merk v. Bowery Min. Co., 31 M 298, 309, 78 P 519; Solberg v. Sunburst Oil & Gas Co., 70 M 177, 182, 225 P 612; Fleming v. Consolidated Motor Sales Co., 74 M 245, 254, 240 P 376; Skinner v. Carlysle Oil Development Co., 80 M 464, 467, 260 P 1038; Ryan v. Bloom, 120 M 443, 186 P 2d 879, 881.

Collateral References

Cancellation of Instruments 21 et seq.; Quieting Title 7.

12 C.J.S. Cancellation of Instruments § 2; 74 C.J.S. Quieting Title § 13 et seq. 13 Am. Jur. 2d 495, Cancellation of Instruments, § 1.

17-1002. (8734) Instrument obviously void. An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury, within the provisions of the last section.

History: En. Sec. 4451, Civ. C. 1895; re-en. Sec. 6116, Rev. C. 1907; re-en. Sec. 8734, R. C. M. 1921. Cal. Civ. C. Sec. 3413. Field Civ. C. Sec. 1907.

Effect on Lease

This section fortifies a holding that when a tax claim has been removed as a cloud on title, a lease given by the tax

claimant no longer constitutes a cloud on the title even though the lessee was not a party to the quiet title action. Purcell v. Gibbs, 133 M 481, 326 P 2d 679.

References

Hicks v. Rupp, 49 M 40, 44, 140 P 97; Heavilin v. O'Connor, 61 M 507, 510, 202 P 1115; Newman v. Northern Montana Assn. of Credit Men, 63 M 545, 554, 208 P 914; Poulos v. Lyman Bros. Co., 63 M

561, 566, 208 P 598; Hammond-Dodson Co. v. Slattery, 67 M 489, 496, 216 P 323; Fleming v. Consolidated Motor Sales Co., 74 M 245, 254, 240 P 376.

Collateral References

Cancellation of Instruments 24; Quieting Title 49.

12 C.J.S. Cancellation of Instruments § 25; 74 C.J.S. Quieting Title § 12.

17-1003. (8735) Cancellation in part. Where an instrument is evidence of different rights or obligations, it may be canceled in part, and allowed to stand for the residue.

History: En. Sec. 4452, Civ. C. 1895; re-en. Sec. 6117, Rev. C. 1907; re-en. Sec. 8735, R. C. M. 1921, Cal. Civ. C. Sec. 3414. Field Civ. C. Sec. 1908.

Collateral References

Cancellation of Instruments 56: Quieting Title 49.

12 C.J.S. Cancellation of Instruments § 78; 74 C.J.S. Quieting Title § 95.

CHAPTER 11

PREVENTIVE RELIEF—INJUNCTIONS

Section 17-1101. Preventive relief-how granted.

17-1101. (8736) Preventive relief—how granted. Preventive relief is granted by injunction, provisional or final.

History: En. Sec. 4460, Civ. C. 1895; re-en. Sec. 6118, Rev. C. 1907; re-en. Sec. 8736, R. C. M. 1921. Cal. Civ. C. Sec. 3420. Field Civ. C. Sec. 1909.

Collateral References

Injunctions = 1 et seq. 43 C.J.S. Injunctions §§ 1, 12. 28 Am. Jur. 490, Injunctions, § 1.

Cross-Reference

Injunctions, sec. 93-4201 et seq.

CHAPTER 12

ALIENATION OF AFFECTIONS—BREACH OF PROMISE TO MARRY

Causes of action for alienation of affections abolished. Section 17-1201.

Causes of action for breach of promise abolished—actions for fraud, 17-1202. deceit, and unjust enrichment preserved.

Acts within state not to give rise to cause of action. Litigation and threat of litigation prohibited.

17-1204.

17-1205. Settlements and compromises void.

17-1206. Penalty for violations.

17-1201. Causes of action for alienation of affections abolished. All civil causes of action for alienation of affections of husband or wife are hereby abolished; provided, however, that this section shall not apply to causes of action which have heretofore accrued.

History: En. Sec. 1, Ch. 200, L. 1963.

17-1202. Causes of action for breach of promise abolished—actions for fraud, deceit, and unjust enrichment preserved. All causes of action for breach of contract to marry are hereby abolished; provided, however, that where a plaintiff has suffered actual damage due to fraud or deceit or a defendant has been unjustly enriched, the plaintiff may maintain an action for fraud or deceit or unjust enrichment and recover therein only the actual damage proved or for the benefit wrongfully obtained or restitution of property wrongfully withheld, where such action otherwise is maintainable under existing law.

History: En. Sec. 2, Ch. 200 L. 1963.

17-1203. Acts within state not to give rise to cause of action. No act hereafter done within this state shall operate to give rise, either within or without this state, to any of the causes of action abolished by this act. No contract to marry, which shall hereafter be made within this state, shall operate to give rise, either within or without this state, to any cause of action for breach thereof. It is the intention of this act to fix the effect, status, and character of such acts and contracts, and to render them ineffective to support or give rise to any such causes of action, within or without this state.

History: En. Sec. 3, Ch. 200, L. 1963.

17-1204. Litigation and threat of litigation prohibited. It shall hereafter be unlawful for any person, either as litigant or attorney, to file, cause to be filed, threaten to file, or threaten to cause to be filed in any court in this state, any pleading or paper setting forth or seeking to recover upon any cause of action abolished or barred by this act, whether such cause of action arose within or without this state.

History: En. Sec. 4, Ch. 200, L. 1963.

17-1205. Settlements and compromises void. All contracts and instruments of every kind which may hereafter be executed within this state in payment, satisfaction, settlement, or compromise of any claim or cause of action abolished or barred by this act, whether such claim or cause of action arose within or without this state, are hereby declared to be contrary to the public policy of this state and absolutely void. It shall be unlawful to cause, induce or procure any person to execute such a contract or instrument, or cause, induce or procure any person to give, pay, transfer, or deliver any money or thing of value in payment, satisfaction, settlement, or compromise of any such claim or cause of action, or to receive, take, or accept any such money or thing of value in such payment, satisfaction, settlement or compromise. It shall also be unlawful to commence or cause to be commenced, either as litigant or attorney in any court of this state, any proceeding or action seeking to enforce or recover upon any such contract or instrument, knowing it to be such, whether the same shall have been executed within or without this state; provided, however, that this section shall not apply to the payment, satisfaction, settlement, or compromise of any causes of action which are not abolished or barred by this act, or any contracts or instruments heretofore executed, or to the bona fide holder in due course of any negotiable instrument which may be executed hereafter.

History: En. Sec. 5, Ch. 200, L. 1963.

17-1206. Penalty for violations. Any person who shall violate any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction therefor shall be punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment for a term of not less than one year nor more than five years, in the discretion of the court.

History: En. Sec. 6, Ch. 200, L. 1963.

TITLE 18

DEBTOR AND CREDITOR

Chapter 1. Debtor and creditor—definitions and general provisions, 18-101 to 18-105.
2. Bulk sales, Repealed—Section 10-102, Chapter 264, Laws of 1963.
3. Assignments for benefit of creditors, 18-301 to 18-330.

CHAPTER 1

DEBTOR AND CREDITOR—DEFINITIONS AND GENERAL PROVISIONS

Who is a debtor. Section 18-101.

18-102. Who is a creditor.

Contracts of debtor are valid.

18-104. Payments in preference.

Relative rights of different creditors.

18-101. (8598) Who is a debtor. A debtor, within the meaning of this chapter, is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent.

History: En. Sec. 4480, Civ. C. 1895; re-en. Sec. 6122, Rev. C. 1907; re-en. Sec. 8598, R. C. M. 1921, Cal. Civ. C. Sec. 3429. Field Civ. C. Sec. 1913.

Cross-References

Arrest of debtor, secs. 93-5901, 93-5902. Joint debtors, proceedings against, secs. 93-8101 to 93-8108.

Representation of credit of third person, admissibility of evidence, sec. 93-1401-8.

References

Harrison v. Riddell, 64 M 466, 478,

210 P 460; Security State Bank v. McIntyre, 71 M 186, 195, 228 P 618; State ex rel. School District No. 4 v. McGraw, 74 M 152, 163, 240 P 812; Merchants' Nat. Bank of Glendive v. Dawson County, 93 M 310, 323, 19 P 2d 892; Beedle v. Carolan, 115 M 587, 590, 148 P 2d 559.

Collateral References

Fraudulent Conveyances 54 (2). 37 C.J.S. Fraudulent Conveyances § 99 et seq.

18-102. (8599) Who is a creditor. A creditor, within the meaning of this chapter, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money.

History: En. Sec. 4481, Civ. C. 1895; re-en. Sec. 6123, Rev. C. 1907; re-en. Sec. 8599, R. C. M. 1921. Cal. Civ. C. Sec. 3430. Field Civ. C. Sec. 1914.

Aetna Accident & Liability Co. v. Miller, 54 M 377, 387, 170 P 760; Harrison v. Riddell, 64 M 466, 478, 210 P 460; Security State Bank v. McIntyre, 71 M 186,

195, 228 P 618; Merchants' Nat. Bank of Glendive v. Dawson County, 93 M 310, 323, 19 P 2d 892; Brown v. American Bonding Co. of Baltimore, Md., 210 Fed 844, 846.

Collateral References

Fraudulent Conveyances 206 et seq. 37 C.J.S. Fraudulent Conveyances § 63

18-103. (8600) Contracts of debtor are valid. In the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract.

History: En. Sec. 4482, Civ. C. 1895; re-en. Sec. 6124, Rev. C. 1907; re-en. Sec. 8600, R. C. M. 1921. Cal. Civ. C. Sec. 3431. Field Civ. C. Sec. 1915.

References

Aetna Accident & Liability Co. v. Miller, 54 M 377, 387, 170 P 760; Harrison v.

Riddell, 64 M 466, 478, 210 P 460; Brown v. American Bonding Co. of Baltimore, Md., 210 Fed 844, 846.

Collateral References

Fraudulent Conveyances € 1 et seq. 37 C.J.S. Fraudulent Conveyances §§ 1, 7.

18-104. (8601) Payments in preference. A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another.

History: En. Sec. 4483, Civ. C. 1895; re-en. Sec. 6125, Rev. C. 1907; re-en. Sec. 8601, R. C. M. 1921. Cal. Civ. C. Sec. 3432. Field Civ. C. Sec. 1916.

Application of Section

If the provision of this section, that a debtor may pay or secure one creditor in preference to another, has any relation to cases of insolvency, it is limited by the rule stated in section 18-307. Aetna Accident & Liability Co. v. Miller, 54 M 377, 387, 170 P 760.

The rule declared by this section and section 18-307 that a debtor may pay one creditor in preference to another, provided that other be not a preferred creditor, applies to an insolvent debtor as well as to a solvent one, and under it an insolvent debtor may transfer property in payment of a debt justly due though he knows that the effect of the transaction will be to defeat another in the collection of his debt. Hale v. Belgrade Co., Ltd., 75 M 99, 112, 242 P 425; Department of Agriculture, Labor and Industry of the State of Montana v. DeVore, 91 M 47, 53, 6 P 2d 125. Under this section, an insolvent debtor

Under this section, an insolvent debtor may prefer one creditor to another; the preference may be made by conveyance of property, real or personal, either directly to the creditor or to a third person for the creditors' benefit, and, if made, the property is not subject to seizure under legal process. Costello v. Shields, 99 M 335, 43 P 2d 879.

Form of Preference Immaterial

In the absence of positive statutory provision declaring otherwise, if a preference given by a debtor to his creditor is in other particulars unobjectionable, the form of the transaction by which it is made is immaterial. Department of Agriculture, Labor and Industry of the State of Montana v. DeVore, 91 M 47, 53, 6 P 2d 125.

Transfer of Property in Excess of Debt

While a debtor may prefer one creditor over another, where he transfers to one creditor in payment of a debt property the value of which is greatly in excess of the amount due, it is a badge of fraud affording strong evidence thereof. Security State Bank v. McIntyre, 71 M 186, 204, 228 P 618; Godfrey L. Cabot, Inc. v. Gas Products Co., 93 M 497, 509, 19 P 2d 878.

Transfers by Husband to Wife

An alleged fraudulent transfer of property by a husband to his wife should be closely scrutinized on account of the opportunities afforded by the relation, but a husband, honestly indebted to his wife, may give her a valid preference either by transfer of money or property in payment or by giving security, to the same extent as he may prefer any other creditor, and such preference is not of itself fraudulent as to other creditors of the husband. Harrison v. Riddell, 64 M 466, 478, 210 P 460.

References

Mieyr v. Federal Surety Co. of Davenport, Iowa, 97 M 503, 509, 34 P 2d 982; Brown v. American Bonding Co. of Baltimore, Md., 210 Fed 844, 846.

Collateral References

Fraudulent Conveyances № 115. 37 C.J.S. Fraudulent Conveyances § 235 et seq.

18-105. (8602) Relative rights of different creditors. Where a creditor is entitled to resort to each of several funds for the satisfaction of his claim, and another person has an interest in, or is entitled as a creditor to resort to some, but not all of them, the latter may require the former to seek satisfaction from those funds to which the latter has no such claim, so far as it can be done without impairing the right of the former to complete satisfaction, and without doing injustice to third persons.

History: En. Sec. 4484, Civ. C. 1895; re-en. Sec. 6126, Rev. C. 1907; re-en. Sec. 8602, R. C. M. 1921. Cal. Civ. C. Sec. 3433. Field Civ. C. Sec. 1917.

Collateral References

55 C.J.S. Marshaling Assets and Securities § 1 et seq.

CHAPTER 2

BULK SALES

(Repealed-Section 10-102, Chapter 264, Laws of 1963)

18-201 to 18-205. (8607 to 8611) Repealed.

These sections (Secs. 1 to 5, Ch. 145, L. 1907; Sec. 1, Ch. 128, L. 1915; Secs. 1 to 4, Ch. 106, L. 1931), relating to bulk

sales were repealed by Sec. 10-102, Ch. 264, Laws 1963. For present law see secs. 87A-6-101 to 87A-6-111.

CHAPTER 3

ASSIGNMENTS FOR BENEFIT OF CREDITORS

Section 18-301. When debtor may execute assignment.

18-302. Insolvency, what constitutes.

18-303. Certain transfers not affected. 18-304.

What debts may be secured.

18-305. Preference may be given for wages.

18-306. Preference must be absolute.

18-307. Certain rights not affected by preferences in assignment.

18-308. Joint and separate debts. 18-309. Assignment-when void.

18-310. The instrument of assignment.

18-311. Compliance with provisions of last section necessary to validity of assignment.

18-312. Assignee takes subject to rights of third parties.

18-313. Inventory required.

18-314. Verification of inventory—assignee to file, when—removal of assignee for failure to file-inspection of assignor's books and papers.

18-315. Recording assignment and filing inventory.

18-316. Recording assignment and filing inventory-more than one assignor recording assignment.

18-317. Effect of omitting to record.

18-318. Assignment of real property.

18-319. Bond of assignees.

18-320. Conditions of disposal and conversion.

18-321. Notice to creditors to present claims.

18-322. Notices to parties interested in the estate as creditors or otherwise.

18-323. Duties of assignee.

18-324. Power of court.

18-325. Further security required.

18-326. Accounting of assignee.

18-327. Property exempt.

18-328. Compensation.

Assignees protected for acts done in good faith. 18-329.

18-330. Assent of creditors necessary to modification of assignment.

(8612) When debtor may execute assignment. An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust for the satisfaction of his creditors, in conformity to the provisions of this chapter; subject, however, to the provisions of this code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specific classes or persons.

History: En. Sec. 4510, Civ. C. 1895; re-en. Sec. 6136, Rev. C. 1907; re-en. Sec. 8612, R. C. M. 1921. Cal. Civ. C. Sec. 3449. Field Civ. C. Sec. 1924.

Cross-Reference

Fraudulent conveyances, secs. 29-101 to 29-210.

Assignee Not a Receiver

Neither an original assignee nor his successor, as such, is a receiver. Babcock v. Maxwell, 21 M 507, 513, 54 P 943. See Aetna Accident & Liability Co. v. Miller, 54 M 377, 389, 170 P 760.

Common-law Rule Still Exists

The rule of common law still exists under this section and sections 18-302 to 18-320 to the effect that the execution of an assignment for the benefit of creditors is no bar to an action by a creditor against the assignor, and does not affect the right of the creditor to proceed to judgment after the assignment is made. Acme Harvesting Mach. Co. v. Benedict, 58 M 110, 190 P 287.

Differentiation between Composition and Assignment for Benefit of Creditors

The distinction between an assignment for the benefit of creditors, and a composition with creditors, is that the latter requires the assent of the creditors, while the former does not. Pioneer Minerals Corp. v. Larabic Bros. Bankers, 99 M 358, 362, 43 P 2d 884.

Purpose of Statute

The provisions of this chapter merely regulate common-law assignments for the benefit of creditors. Babcock v. Maxwell, 21 M 507, 513, 54 P 943.

Suit against Assignee

One who has been appointed by the court the successor of an assignce of an insolvent may be sued without leave of court. Babcock v. Maxwell, 21 M 507, 513, 54 P 943.

18-302. (8613) Insolvency, what constitutes. A debtor is insolvent, within the meaning of this chapter, when he is unable to pay his debts from his own means, as they become due.

History: En. Sec. 4511, Civ. C. 1895; re-en. Sec. 6137, Rev. C. 1907; re-en. Sec. 8613, R. C. M. 1921. Cal. Civ. C. Sec. 3450. Field Civ. C. Sec. 1925.

References

Stadler v. First Nat. Bank of Helena, 22 M 190, 219, 56 P 111.

Under sections 18-301 to 18-330, whereby a complete procedure for the adminisistration and settlement of estates assigned for the benefit of creditors is provided, the district court of the county in which an assignment is made has exclusive jurisdiction, both in cases at law and in equity, arising out of the assignment and relating to the distribution of the assets of the estate, and therefore an action against an assignee to establish a claim against the estate in his charge in a county other than that in which the assignment proceedings were pending was properly dismissed for lack of jurisdiction. Stanton Trust & Savings Bank v. Northern Montana Assn. of Credit Men, 77 M 153, 250 P 596. See also Patrick & Co. v. McDonnell, 61 M 236, 241, 201 P 1009.

References

Babcock v. Maxwell, 29 M 31, 33, 74 P 64; State ex rel. Marshall-Wells Co. v. District Court, 74 M 34, 36, 237 P 523; In re Halvorson Mercantile Co., 112 M 563, 566, 118 P 2d 1047.

Collateral References

Assignments for Benefit of Creditors

6 C.J.S. Assignments for Benefit of Creditors §§ 1, 5 et seq.

6 Am. Jur. 2d 328, Assignments For Benefit of Creditors, § 4.

Validity and effect of provisions in assignments for creditors authorizing assignces to continue assignor's business. 23 ALR 199.

Right of receiver, assignee, or trustee in bankruptey to possession and administration of collateral validly pledged by his insolvent. 28 ALR 409.

Validity of corporation's assignment for benefit of creditors as affected by president's lack of authority from directors to make the same. 10 ALR 2d 713.

Good will as passing by implication under assignment of business for benefit of creditors. 65 ALR 2d 507.

Collateral References

Assignments for Benefit of Creditors

26.

6 C.J.S. Assignments for Benefit of Creditors § 8.

18-303. (8614) Certain transfers not affected. The provisions of this chapter do not prevent a person residing in another state or country from

making there, in good faith, and without intent to evade the laws of this state, a transfer of property situated within it; nor do they affect the power of a person, although insolvent, and within this state, to transfer property to a particular creditor for the purpose of paying or securing the whole or a part of a debt owing to such creditor, whether in his own right or otherwise.

History: En. Sec. 4512, Civ. C. 1895; re-en. Sec. 6138, Rev. C. 1907; re-en. Sec. 8614, R. C. M. 1921. Cal. Civ. C. Sec. 3451. Field Civ. C. Sec. 1926.

Department of Agriculture, Labor and Industry of the State of Montana v. De-Vore, 91 M 47, 54, 6 P 2d 125.

Collateral References

Assignments for Benefit of Creditors

6 C.J.S. Assignments for Benefit of Cred-

itors § 9. 6 Am. Jur. 2d 369, Assignments for Benefit of Creditors, § 70.

Right of receiver, assignee or trustee in bankruptcy to possession and administration of collateral validly pledged by his insolvent. 28 ALR 409.

(8615) What debts may be secured. An assignment for the benefit of creditors may provide for any subsisting liability of the assignor which he might lawfully pay, whether absolute or contingent.

History: En. Sec. 4513, Civ. C. 1895; re-en. Sec. 6139, Rev. C. 1907; re-en. Sec. 8615, R. C. M. 1921. Cal. Civ. C. Sec. 3452. Field Civ. C. Sec. 1927.

Collateral References

Assignments for Benefit of Creditors

6 C.J.S. Assignments for Benefit of Creditors § 13.

18-305. (8616) Preference may be given for wages. In all assignments of property made by any person, association, corporation, copartnership, chartered company, or corporation, to trustees or assignees on account of inability of the assignor or assignors at the time of the assignment to pay his or their debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks, or laborers employed by such assignor or assignors for services rendered within four (4) months immediately previous to such assignment, not to exceed the actual amount owed for each person, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of such assignor.

History: En. Sec. 2050, 5th Div. Comp. Stat. 1887; re-en. Sec. 4514, Civ. C. 1895; re-en. Sec. 6140, Rev. C. 1907; re-en. Sec. 8616, R. C. M. 1921; amd. Sec. 6, Ch. 109, L. 1943.

Application of Section

Where there is no evidence in the record, and the findings of the court bring the plaintiff within the operation of this section, a judgment for plaintiff against an assignee for the benefit of creditors will be affirmed on the authority of Flanders will be affirmed on the authority of Flanders v. Murphy, 10 M 398, 25 P 1052, and Marshall v. Livingston Nat. Bank, 11 M 351, 28 P 312; Knatz v. Wise, 16 M 555, 557, 41 P 710.

This section deals with insolvency proceedings, and into them injects an automatic preference in favor of wage claims to an amount not exceeding \$200 each;

but this at most could amount to nothing more than an assent by the state to share its preference in such cases with such claims. Actna Accident & Liability Co. v. Miller, 54 M 377, 387, 170 P 760.

Assignment to Creditor for His Sole Benefit

It is no objection to a complaint in an action by a laborer to enforce his claim that it alleges an assignment to a creditor directly for his sole benefit, and not as a trustee or for the benefit of creditors. Flanders v. Murphy, 10 M 398, 400, 25 P 1052; Marshall v. Livingston Nat. Bank, 11 M 351, 364, 28 P 312.

Chattel Mortgage as Assignment

Where the effect of an instrument conveying personal property is a transfer of a debtor's property to a creditor, with power to make an immediate sale of the same and render the overplus, after satisfying the debt therein described, to the debtor, which debt is made to be due at once, the transaction, though under the name and in the form of a chattel mortgage, will be regarded as an assignment and within the operation of a statute making the wages of an employee of the services were rendered within sixty days immediately preceding such assignment.

Marshall v. Livingston Nat. Bank, 11 M 351, 361, 28 P 312.

References

Brown v. American Bonding Co. of Baltimore, Md., 210 Fed 844, 846.

Collateral References

Assignments for Benefit of Creditors 123.

6 C.J.S. Assignments for Benefit of Creditors § 67.

18-306. (8617) Preference must be absolute. A preference, in an assignment for the benefit of creditors, can only be given absolutely, and without reserving any power of revocation.

History: En. Sec. 4515, Civ. C. 1895; re-en. Sec. 6141, Rev. C. 1907; re-en. Sec. 8617, R. C. M. 1921. Field Civ. C. Sec. 1929.

Collateral References

Assignments for Benefit of Creditors 105.

6 C.J.S. Assignments for Benefit of Creditors § 47.

6 Am. Jur. 2d 368, Assignments for Benefit of Creditors, § 69.

18-307. (8618) Certain rights not affected by preferences in assignment. No provision in an assignment, giving a preference to a creditor, can affect or impair any right of another creditor to priority of payment, whether created by law or arising from an obligation or transaction of the parties.

History: En. Sec. 4516, Civ. C. 1895; re-en. Sec. 6142, Rev. C. 1907; re-en. Sec. 8618, R. C. M. 1921. Field Civ. C. Sec. 1930.

Tax Collections

The state is not bound by the general language of a statute which tends to restrain or to diminish its powers, rights, or interests; its right to a preference claim, on a fund collected as taxes and held by a bank cannot, as against general creditors of the bank, be thus defeated.

Aetna Accident & Liability Co. v. Miller, 54 M 377, 388, 170 P 760.

Collateral References

Assignments for Benefit of Creditors

6 C.J.S. Assignments for Benefit of Creditors § 353 et seq.

Statutory priority as affecting validity of provision in deed or transfer to assignee for benefit of creditors for payment of attorneys' fees. 79 ALR 2d 513.

18-308. (8619) Joint and separate debts. Joint, or joint and several debtors, can prefer their joint creditors only out of joint property; and can prefer the individual creditors of each only out of the separate property of each.

History: En. Sec. 4517, Civ. C. 1895; 8619, R. C. M. 1921. Field Civ. C. Sec. re-en. Sec. 6143, Rev. C. 1907; re-en. Sec. 1931.

- 18-309. (8620) Assignment—when void. An assignment for the benefit of creditors is void against any creditor of the assignor not assenting thereto in the following cases:
- 1. If it give a preference dependent upon any condition or contingency, or with any power of revocation reserved.
- 2. If it tend to coerce any creditor to release or compromise his demand.
 - 3. If it provide for the payment of any claim known by the assignor

to be false or fraudulent, or for the payment of more upon any claim than is known to be justly due from the assignor.

- 4. If it reserve any interest in the assigned property, or in any part thereof, to the assignor, or for his benefit, before all existing debts are paid.
- 5. If it confer upon the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property to the purposes of the trust.
 - 6. If it exempt him from liability for neglect of duty or misconduct.
 - 7. If it violate section 86-302 of this code.

History: En. Sec. 4518, Civ. C. 1895; re-en. Sec. 6144, Rev. C. 1907; re-en. Sec. 8620, R. C. M. 1921. Cal. Civ. C. Sec. 3457. Based on Field Civ. C. Sec. 1932.

References

Galbraith v. Kline, 7 F 2d 682.

Collateral References

Assignments for Benefit of Creditors 5 40, 41.

6 C.J.S. Assignments for Benefit of Creditors § 21.

6 Am. Jur. 2d 341, Assignments for Benefit of Creditors, § 27.

Validity and effect of provisions in assignments for creditors authorizing assignce to continue assignor's business. 23 ALR 199.

Good will as passing by implication under assignment of business for benefit of creditors, 65 ALR 2d 507.

Statutory priority as affecting validity of provision in deed or transfer to assignee for benefit of creditors for payment of attorneys' fees. 79 ALR 2d 513.

18-310. (8621) The instrument of assignment. An assignment for the benefit of creditors must be in writing, subscribed by the assignor, or by his agent thereto authorized by writing. It must be acknowledged, or proved and certified, in the mode prescribed by the chapter on recording transfers of real property, and recorded as required by sections 18-315 and 18-316; but recording in one county constitutes a compliance with the lastmentioned sections. The assignment must be accompanied by the affidavit of the assignor and assignee that such assignment is made in good faith, for the benefit of the creditors of the assignor, and without any design to hinder, delay, or defraud such creditors. The assent of the assignee, subscribed and acknowledged by him, must appear in writing, embraced in, or at the end of, or endorsed upon, the assignment, before the same is recorded, and, if separate from the assignment, must be duly acknowledged.

History: En. Sec. 4519, Civ. C. 1895; re-en. Sec. 6145, Rev. C. 1907; re-en. Sec. 8621, R. C. M. 1921. Cal. Civ. C. Sec. 3458. Based on Field Civ. C. Sec. 1933.

Collateral References

Assignments for Benefit of Creditors 52-84.

6 C.J.S. Assignments for Benefit of Creditors §§ 107-111, 113, 117.

18-311. (8622) Compliance with provisions of last section necessary to validity of assignment. Unless the provisions of the last section are complied with, an assignment for the benefit of creditors is void against every creditor of the assignor not assenting thereto.

History: En. Sec. 4520, Civ. C. 1895; re-en. Sec. 6146, Rev. C. 1907; re-en. Sec. 8622, R. C. M. 1921. Cal. Civ. C. Sec. 3459. Field Civ. C. Sec. 1934.

Collateral References

Assignments for Benefit of Creditors 40, 82.

6 C.J.S. Assignments for Benefit of Creditors § 19.

18-312. (8623) Assignee takes subject to rights of third parties. An assignee for the benefit of creditors is not to be regarded as a purchaser for

value, and has no greater rights than his assignor has, in respect to things in action transferred by the assignment.

History: En. Sec. 4521, Civ. C. 1895; re-en. Sec. 6147, Rev. C. 1907; re-en. Sec. 8623, R. C. M. 1921. Cal. Civ. C. Sec. 3460. Field Civ. C. Sec. 1935.

Attack of Previous Transfer

An assignee for the benefit of creditors cannot attack a previous transfer by the assignor as in fraud of creditors. Babcock v. Maxwell, 29 M 31, 33, 74 P 64.

Pledged Property

An assignee for the benefit of creditors, to whom is assigned the title to stock pledged by the assignor, notice of the assignment being given to the pledgee,

stands in the shoes of his assignor, in so far as his rights as a pledgor are concerned. Such assignee, in making a sale for cash, may set aside a sale to one, who could pay but a small part of the amount bid, and may resell the property on a smaller cash bid. Such assignee may redeem property pledged by the assignor. Durfee v. Harper, 22 M 354, 368, 56 P 582

Collateral References

Assignments for Benefit of Creditors 215 et seq.

6 C.J.S. Assignments for Benefit of Creditors § 181 et seq.

18-313. (8624) Inventory required. Within twenty days after an assignment is made for the benefit of creditors, the assignor must make and file, in the manner prescribed by section 18-315, a full and true inventory, showing:

- 1. All the creditors of the assignor;
- 2. The place of residence of each creditor, if known to the assignor; or if not known, that fact must be stated;
- 3. The sum owing to each creditor and the nature of each debt or liability, whether arising on written security, account, or otherwise;
- 4. The true consideration of the liability in each case, and the place where it arose:
- 5. Every existing judgment, mortgage, or other security for the payment of any debt or liability of the assignor;
- 6. All property of the assignor at the date of the assignment, which is exempt by law from execution; and,
- 7. All of the assignor's property at the date of the assignment, both real and personal, of every kind, not so exempt, and the encumbrances existing thereon, and all vouchers and securities relating thereto, and the value of such property, according to the best knowledge of the assignor.

History: En. Sec. 4522, Civ. C. 1895; re-en. Sec. 6148, Rev. C. 1907; re-en. Sec. 8624, R. C. M. 1921. Cal. Civ. C. Sec. 3461. Field Civ. C. Sec. 1936.

References

In re Halvorson Mercantile Co., 112 M 563, 564, 118 P 2d 1047.

Collateral References

Assignments for Benefit of Creditors 71-75.

6 C.J.S. Assignments for Benefit of Creditors 8 116.

itors § 116. 6 Åm. Jur. 2d 389, Assignments for Benefit of Creditors, § 100.

18-314. (8625) Verification of inventory—assignee to file, when—removal of assignee for failure to file—inspection of assignor's books and papers. (1) An affidavit must be made by every person executing an assignment for the benefit of creditors, to be annexed to and filed with the inventory mentioned in the last section, to the effect that the same is in all respects just and true, according to the best of such assignor's knowledge and belief; but in case such assignor shall omit, neglect, or refuse to make and deliver such inventory within the twenty days required, the assignee named in such assignment shall, within thirty days after the date thereof,

cause to be made and delivered to the judge of the district court of the county where such assignment is recorded such inventory as above required, in so far as he can; and for such purpose, said judge shall, at any time, upon the application of such assignee, compel by order such delinquent assignor, and any other person, to appear before him and disclose, upon oath, any knowledge or information he may possess, necessary to the proper making of such inventory.

(2) The assignee shall verify the inventory so made by him to the effect that the same is in all respects just and true to the best of his knowledge and belief. But in case the said assignee shall be unable to make and file such inventory within said thirty days, the district judge may, upon application upon oath, showing such inability, allow him such further time as shall be necessary, not exceeding sixty days. If the assignee fail to make and file such inventory within said thirty days, or such further time as may be allowed, the district judge shall require, by order, the assignee forthwith to appear before him and show cause why he should not be removed. Any person interested in the trust estate may apply for such order and demand such removal. The books and papers of such delinquent assignor shall at all times be subject to the inspection and examination of any creditor. The district judge is authorized by order to require such debtor or assignee to allow such inspection or examination. Disobedience to such order is hereby declared to be a contempt, and obedience to such order may be enforced by attachment. The inventory shall be filed by said district judge in the office of the clerk of said county in which said assignment is recorded.

History: En. Sec. 4523, Civ. C. 1895; re-en. Sec. 6149, Rev. C. 1907; re-en. Sec. 8625, R. C. M. 1921. Cal. Civ. C. Sec. 3462.

Cross-Reference

Application of Montana Rules of Civil

Procedure to proceedings on assignment, see M. R. Civ. P., Rule 81(a), Table A.

Collateral References

Assignments for Benefit of Creditors 73.

6 C.J.S. Assignments for Benefit of Creditors § 116.

18-315. (8626) Recording assignment and filing inventory. An assignment for the benefit of creditors must be recorded, and the inventory required by section 18-313 filed with the county clerk of the county in which the assignor resided at the date of the assignment; or, if he did not then reside in this state, with the clerk of the county in which his principal place of business was then situated; or, if he had not then a residence or place of business in this state, with the clerk of the county in which the principal part of the assigned property was then situated.

History: En. Sec. 4524, Civ. C. 1895; re-en. Sec. 6150, Rev. C. 1907; re-en. Sec. 8626, R. C. M. 1921, Cal. Civ. C. Sec. 3463. Based on Field Civ. C. Sec. 1938.

References

Stanton Trust & Savings Bank v. North-

ern Montana Assn. of Credit Men, 77 M 153, 159, 250 P 596.

Collateral References

Assignments for Benefit of Creditors 163-169.

6 C.J.S. Assignments for Benefit of Creditors § 118.

18-316. (8627) Recording assignment and filing inventory—more than one assignor recording assignment. If an assignment for the benefit of creditors is executed by more than one assignor, it must be recorded, and a copy of the inventory required by section 18-313 must be filed with the

county clerk of the county in which any of the assignors resided at its date, or in which any of them, not then residing in this state, had then a place of business.

History: En. Sec. 4525, Civ. C. 1895; re-en. Sec. 6151, Rev. C. 1907; re-en. Sec. 8627, R. C. M. 1921. Cal. Civ. C. Sec. 3464. Based on Field Civ. C. Sec. 1939.

Collateral References

Assignments for Benefit of Creditors 52 165.

6 C.J.S. Assignments for Benefit of Creditors § 118.

18-317. (8628) Effect of omitting to record. An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and encumbrances in good faith and for value, unless it is recorded within twenty days after the date of the assignment.

History: En. Sec. 4526, Civ. C. 1895; re-en. Sec. 6152, Rev. C. 1907; re-en. Sec. 8628, R. C. M. 1921. Cal. Civ. C. Sec. 3465. Based on Field Civ. C. Sec. 1940.

Collateral References

Assignments for Benefit of Creditors 5270.

6 C.J.S. Assignments for Benefit of Creditors § 118.

18-318. (8629) Assignment of real property. Where an assignment for the benefit of creditors embraces real property, it is subject to the provisions of sections 73-201 to 73-205, as well as to those of this chapter.

History: En. Sec. 4527, Civ. C. 1895; re-en. Sec. 6153, Rev. C. 1907; re-en. Sec. 8629, R. C. M. 1921. Cal. Civ. C. Sec. 3466. Field Civ. C. Sec. 1941.

Collateral References

Assignments for Benefit of Creditors 263-170.

6 C.J.S. Assignments for Benefit of Creditors § 118.

18-319. (8630) Bond of assignees. Within thirty days after the date of an assignment for the benefit of creditors, the assignee must enter into a bond to the state, for the use and benefit of the creditors, in such amount as may be fixed by a judge of the district court of the county in which the original inventory is filed, with sufficient sureties to be approved by such judge, and conditioned for the faithful discharge of the trust, and the due accounting for all moneys received by the assignee, which bond must be filed in the same office with the original inventory.

History: En. Sec. 4528, Civ. C. 1895; re-en. Sec. 6154, Rev. C. 1907; re-en. Sec. 8630, R. C. M. 1921. Cal. Civ. Sec. 3467. Based on Field Civ. C. Sec. 1942.

References

State ex rel. Marshall-Wells Co. v. District Court, 74 M 34, 37, 237 P 523; Stanton Trust & Savings Bank v. Northern Montana Assn. of Credit Men, 77 M 153, 159, 250 P 596.

Collateral References

Assignments for Benefit of Creditors 205-208.

6 C.J.S. Assignments for Benefit of Cred-

itors § 174. 6 Am. Jur. 2d 392, Assignments for Benefit of Creditors, § 105.

What are official, as distinguished from individual, acts for which sureties or bond of assignee for creditors are liable. 50 ALR 314.

18-320. (8631) Conditions of disposal and conversion. Until the inventory and affidavit required by sections 18-313 and 18-314 have been made and filed, and the assignee has given bond as required by the last section, the assignee for the benefit of creditors has no authority to dispose of the estate or convert it to the purposes of the trust. But in case the assignor shall fail to present such inventory within the twenty days required, then the assignee, before the ten days shall have elapsed, may apply

to said district judge by verified petition, for leave to file a provisional bond, until such time as he may be able to present the inventory as hereinbefore provided. The district judge shall, in the case provided in section 18-314. and may also at any time, on the petition of one or more creditors, showing misconduct or incompetency of the assignee, or on petition of the assignee himself, showing sufficient reason therefor, and after due notice of not less than five days to the assignor, assignee, surety, and such other persons as such judge may prescribe, remove or discharge the assignee, and appoint one or more in his place, and order an accounting of the assignee so removed or discharged, and may enjoin said assignee from interfering with the assignor's estate, and make provision by order for the safe custody of the same, and enforce obedience to such injunction and orders by attachment; and, upon his discharge, upon his own application, such assignee's bond shall be canceled and discharged. The new assignee shall give a bond, to be approved as required. The district judge shall have power, by order, to require or allow any inventory or schedule filed to be corrected or amended, and also to require and compel, from time to time, supplemental inventories or schedules to be made and filed within such time as he shall prescribe, and to enforce obedience to such orders by attachment.

History: Ap. p. Sec. 4529, Civ. C. 1895; re-en. Sec. 6155, Rev. C. 1907; amd. Sec. 1, Ch. 180, L. 1919; amd. Sec. 1, Ch. 215, L. 1921; re-en. Sec. 8631, R. C. M. 1921. Cal. Civ. C. Sec. 3468.

References

Patrick & Co. v. McDonnell, 61 M 236, 241, 201 P 1009; Stanton Trust & Savings

Bank v. Northern Montana Assn. of Credit Men, 77 M 153, 160, 250 P 596.

Collateral References

Assignments for Benefit of Creditors 205-214, 220 et seq.

6 C.J.S. Assignments for Benefit of Creditors §§ 174-180.

6 Am. Jur. 2d 403, Assignments for Benefit of Creditors, § 125.

18-321. (8632) Notice to creditors to present claims. The judge may, upon the petition of the assignee, authorize him to advertise for creditors to present to him their claims, with the vouchers therefor, duly verified, on or before a day to be specified in such advertisement, not less than ten days from the publication thereof, which advertisement or notice shall be published in one newspaper, to be designated by the judge, as most likely to give notice to the persons to be served, at least once and such additional times as the judge may direct; the last publication shall be at least one week prior to the date specified.

Said verified claims of creditors shall set forth whether any, and if so, what securities are held for such claims, and whether any, and if so, what payments have been made thereon.

History: En. Sec. 1, Ch. 180, L. 1919; amd. Sec. 1, Ch. 215, L. 1921; re-en. Sec. 8632, R. C. M. 1921.

Time for Presentation of Claims

The rule that where the time within which creditors must present their claims to an assignee is fixed by statute, the failure of a creditor to present his claim within that time bars him from his right to participate in dividends, is, in principle, applicable where, as in this state (this section), the district judge may fix the

time for such presentation. State ex rel. Marshall-Wells Co. v. District Court, 74 M 34, 237 P 523.

References

Stanton Trust & Savings Bank v. Northern Montana Assn. of Credit Men, 77 M 153, 159, 250 P 596.

Collateral References

Assignments for Benefit of Creditors 301-305.

6 C.J.S. Assignments for Benefit of Creditors §§ 311, 313, 314, 316.

Right of creditor to interest after bankruptcy, declared insolvency, or appointment of receiver, where assets are more than sufficient to pay the principal of all claims. 39 ALR 457 and 44 ALR 1170.

Time limitation as to filing of claims against insolvent as affected by excuses, and the nature of such excuses. 109 ALR 1404.

18-322. (8633) Notices to parties interested in the estate as creditors or otherwise. Parties interested in the estate as creditors, or parties otherwise interested, if the judge so directs, shall have at least ten days' notice by mail to their respective addresses as they appear in the schedule filed by the assignor, or at such other addresses as they shall have filed with the assignee of (a) all proposed sales of property, in bulk, (b) the filing of the final account of the assignee and of the hearing thereon, (c) any proposed compromise with creditors. Such notice may be given as the judge shall direct and must be returnable in court, or before the judge of the court, at chambers in the district.

History: En. Sec. 1, Ch. 180, L. 1919; amd. Sec. 1, Ch. 215, L. 1921; re-en. Sec. 8633, R. C. M. 1921.

References

Stanton Trust & Savings Bank v. Northern Montana Assn. of Credit Men, 77 M 153, 159, 250 P 596.

Collateral References

Assignments for Benefit of Creditors 242, 316, 375.

6 C.J.S. Assignments for Benefit of Creditors §§ 200, 263, 349.

18-323. (8634) Duties of assignee. It shall be the duty of the assignee to collect and reduce to money the property of the estate, close up the estate as expeditiously as possible; to sell the property of the estate as soon as practicable, and to sell the accounts and bills receivable when deemed advisable; furnish such information concerning the estate as may be requested by parties in interest; keep regular accounts, pay dividends as often as is compatible with the best interests of the estate; file a final report and account at least ten days before the hearing thereon.

History: En. Sec. 1, Ch. 180, L. 1919; amd. Sec. 1, Ch. 215, L. 1921; re-en. Sec. 8634, R. C. M. 1921.

References

Stanton Trust & Savings Bank v. Northern Montana Assn. of Credit Men, 77 M 153, 160, 250 P 596.

Collateral References

Assignments for Benefit of Creditors \cong 215 et seq.

6 C.J.S. Assignments for Benefit of Creditors § 181.

Good will as passing by implication on sale of business by assignee for benefit of creditors. 65 ALR 2d 507.

18-324. (8635) Power of court. The court shall have power:

- 1. To authorize the business of the assignor to be conducted for a limited period by assignee, if necessary in the best interests of the estate, and allow additional compensation for such services:
- 2. To reopen estates when it appears they were closed before being fully administered, and for that purpose to appoint another assignee who will take title to the property not administered upon;
- 3. To direct upon the final settlement of the estate that the assignee pay to the lawful creditors their proportionate dividend, notwithstanding their claim has not been presented in accordance with the notice sent out by the assignee; provided, that four months have not elapsed since the first publication of notice to creditors;

4. To approve the final report and to discharge the assignee and his surety, from all further liabilities upon matters included in the accounting, to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement.

History: En. Sec. 1, Ch. 180, L. 1919; amd. Sec. 1, Ch. 215, L. 1921; re-en. Sec. 8635, R. C. M. 1921.

Allowance of Claims

Under this section, construed in conjunction with section 18-321, the district court has power upon final settlement of the estate to direct the assignee to pay a lawful creditor his proportionate dividend though his claim was not presented within the time designated in the assignee's call, provided four months have not elapsed since the first publication of notice to creditors, and where a creditor did not present his claim until two years and two months after first publication of notice, the court exceeded its power in allowing the claim. State ex rel. Marshall-Wells Co. v. District Court, 74 M 34, 36, 237 P 523.

Assignee—Responsibility to Court, Duties and Restrictions

The assignee acts as a fiduciary for

the creditors under the control and direction of the district court, sections 18-301 to 18-330 restricting his activity; the court must be advised of the details of a sale of the assets of an insolvent business, and investigate the propriety thereof; and where the court was not advised of the existence of the unlisted property when it approved a sale, there was no approval and therefore it properly ordered the matter reopened. In re Halvorson Mercantile Co., 112 M 563, 566, 118 P 2d 1047.

References

Stanton Trust & Savings Bank v. Northern Montana Assn. of Credit Men, 77 M 153, 160, 250 P 596.

Collateral References

Assignments for Benefit of Creditors 221 et seq., 370 et seq.

6 C.J.S. Assignments for Benefit of Creditors §§ 185 et seq., 266.

18-325. (8636) Further security required. The district judge may, upon his own motion, or upon the application of any party in interest, and on such notice as he may direct to be given to the assignor, assignee, and surety, require further security to be given whenever, in his judgment, the security afforded by the bond on file is not adequate.

History: En. Sec. 4530, Civ. C. 1895; re-en. Sec. 6156, Rev. C. 1907; re-en. Sec. 8636, R. C. M. 1921.

References

Stanton Trust & Savings Bank v. Northern Montana Assn. of Credit Men, 77 153, 160, 250 P 596.

18-326. (8637) Accounting of assignee. After six months from the date of an assignment for the benefit of creditors, the assignee may be required, on petition of any creditor, to account before the district court of the county where the accompanying inventory was filed in the manner prescribed by Title 93.

History: En. Sec. 4531, Civ. C. 1895; re-en. Sec. 6157, Rev. C. 1907; re-en. Sec. 8637, R. C. M. 1921. Cal. Civ. C. Sec. 3469. Based on Field Civ. C. Sec. 1944.

References

Stanton Trust & Savings Bank v. North-

ern Montana Assn. of Credit Men, 77 M 153, 159, 250 P 596.

Collateral References

Assignments for Benefit of Creditors 373, 375.

6 C.J.S. Assignments for Benefit of Creditors §§ 263, 264.

18-327. (8638) Property exempt. Property exempt from execution, and insurance upon the life of the assignor, do not pass to the assignee by a general assignment for the benefit of creditors, unless the instrument specially mentions them, and declares an intention that they should pass thereby.

History: En. Sec. 4532, Civ. C. 1895; re-en. Sec. 6158, Rev. C. 1907; re-en. Sec. 8638, R. C. M. 1921. Cal. Civ. C. Sec. 3470. Field Civ. C. Sec. 1945.

Collateral References

Assignments for Benefit of Creditors 174-183.

6 C.J.S. Assignments for Benefit of Creditors § 135 et seq.

18-328. (8639) Compensation. In the absence of any provision in the assignment to the contrary, an assignee for the benefit of creditors is entitled to the same commissions as are allowed by law to executors and guardians; but the assignment cannot grant more, and may restrict the commissions to a less amount, or deny them altogether.

History: En. Sec. 4533, Civ. C. 1895; re-en. Sec. 6159, Rev. C. 1907; re-en. Sec. 8639, R. C. M. 1921. Cal. Civ. C. Sec. 3471. Field Civ. C. Sec. 1946.

Collateral References

Assignments for Benefit of Creditors 390-393.

6 C.J.S. Assignments for Benefit of Creditors §§ 289-293.

18-329. (8640) Assignees protected for acts done in good faith. An assignee for the benefit of creditors is not to be held liable for his acts, done in good faith, in the execution of the trust, merely for the reason that the assignment is afterwards adjudged void.

History: En. Sec. 4534, Civ. C. 1895; re-en. Sec. 6160, Rev. C. 1907; re-en. Sec. 8640, R. C. M. 1921. Cal. Civ. C. Sec. 3472. Field Civ. C. Sec. 1947.

Collateral References

Assignments for Benefit of Creditors

294, 356, 407. 6 C.J.S. Assignments for Benefit of Creditors §§ 299, 388, 398.

18-330. (8641) Assent of creditors necessary to modification of assignment. An assignment for the benefit of creditors, which has been executed and recorded so as to transfer the property to the assignee, cannot afterwards be canceled or modified by the parties thereto, without the consent of every creditor affected thereby.

History: En. Sec. 4535, Civ. C. 1895; re-en. Sec. 6161, Rev. C. 1907; re-en. Sec. 8641, R. C. M. 1921. Cal. Civ. C. Sec. 3473. Field Civ. C. Sec. 1948.

Collateral References

Assignments for Benefit of Creditors 49.

6 C.J.S. Assignments for Benefit of Creditors § 121.

References

Babcock v. Maxwell, 21 M 507, 513, 54 P 943.

TITLE 19

DEFINITIONS AND GENERAL PROVISIONS

- Chapter 1. Definitions and construction of terms-holidays-other general provisions, 19-101 to 19-122.
 - Publication of notice by radio or television, 19-201 to 19-203,

CHAPTER 1

DEFINITIONS AND CONSTRUCTION OF TERMS—HOLIDAYS—OTHER GENERAL PROVISIONS

Section 19-101. Joint authority, construction of words giving.

19-102. Words and phrases, how construed.

19-103. Certain words defined.

"Heretofore" and "hereafter," meaning of.

19-104. "Heretofore" and "herearter, meaning 19-105. Notice, actual and constructive.
19-106. Constructive notice.
19-107. Legal holidays and business days defined.
19-108. Provisions of school code excepted.
19-109. Certain acts may be done on day following 19-109. Certain acts may be done on day following holiday.
19-110. Seal defined.
19-111. Great seal.
19-112. Seals of executive officers.

19-113. State flag.
19-114. Design of state flag.

19-115. Bitterroot state floral emblem.
19-116. Western meadow lark designated as official bird of state.
19-117. Official map of Montana.
19-118. Custody of plates for map—corrections.

19-119 to 19-121. Repealed.

19-122. Certified and registered mail.

19-101. (14) Joint authority, construction of words giving. Words giving a joint authority to three or more public officers, or other persons, are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

History: En. Sec. 14, Pol. C. 1895; reen. Sec. 14, Rev. C. 1907; re-en. Sec. 14, R. C. M. 1921. Cal Pol. C. Sec. 15.

Appeal by Trustees

One of five statutory trustees in charge of the affairs of a dissolved corporation may not prosecute an appeal to the supreme court from an order appointing a receiver for the corporation against the

wishes of his cotrustees, irrespective of whether unit or majority rule of action controls under certain statutes. Union Bank & Trust Co. of Helena v. Penwell, 99 M 255, 267, 42 P 2d 457.

Collateral References

Officers@=108. 67 C.J.S. Officers § 109.

19-102. (15) Words and phrases, how construed. Words and phrases used in the codes or other statutes of Montana are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, as amended, are to

be construed according to such peculiar and appropriate meaning or defini-

History: En. Sec. 15, Pol. C. 1895; reen. Sec. 15, Rev. C. 1907; amd. Sec. 3, Ch. 4, L. 1921; re-en. Sec. 15, R. C. M. 1921. Cal. Pol. C. Sec. 16.

Force of Ordinary Rules of Grammar

Since under this section, statutes must be interpreted according to the ordinary rules of grammar, and if, when thus regarded, the words embody a definite meaning involving no absurdity or contradiction, the court may not add to or take from their meaning, in construing section 93-9715 the words "of the damages thus assessed, and of the rent found due" obviously constitute two separate and coordinate prepositional phrases connected by the word "and," the antecedent of both phrases being the noun "amount," and the amount which must be trebled in the judgment includes rent as well as damages, the court having no discretion in the matter. Steinbrenner v. Love, 113 M 466, 468, 129 P 2d 101.

Words in Common Use

"Facility" is not a technical word, but one in common use, and its meaning is to be found in the sense attached to it by approved usage; and moneys raised by a tax to furnish "additional school facilities" may be used to pay the salaries of teachers. State ex rel. Knight v. Cave, 20

"Each party," Mullery v. Great Northern Ry. Co., 50 M 408, 416, 148 P 323.

"Malt liquors," State v. Centennial Brewing Co. 55 M 500, 517, 179 P 296.

"Manufacture," State v. Hennessy Co.,

71 M 301, 303, 230 P 64.
"Width," State ex rel. Keane v. Board of County Commrs., 83 M 540, 551, 273 P

References

State v. Redmond, 73 M 376, 380, 237 P 486; McNair v. School District No. 1, 87 M 423, 427, 288 P 188; State ex rel. State Board of Education v. Nagle, 100 M 86, 91, 45 P 2d 1041; State ex rel. Freebourn 91, 45 F 2d 1041; State ex Fel. Freebourn
v. Merchants' Credit Service, Inc., 104 M
76, 101, 66 P 2d 337; Young v. Waldrop,
111 M 359, 364, 109 P 2d 59; McCarten v.
Sanderson, 111 M 407, 109 P 2d 1108,
1111; Bergin v. Temple, 111 M 539, 549,
111 P 2d 286; State v. Jolly, 112 M 352,
355, 116 P 2d 686; General Finance Co. v. Powell, 112 M 535, 540, 118 P 2d 751; State ex rel. Palagi v. Regan, 113 M 343, 349, 126 P 2d 818; State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 65, 132 P 2d 689; Pampel v. State Board of Examiners, 114 M 380, 386, 136 P 2d 991; In re Irvine's Estate, 114 M 577, 582, 139 P 2d 489; Grady v. City of Livingston, 115 M 47, 55, 141 P 2d 346; Shields v. Shields, 115 M 146, 155, 139 Shields v. Shields, 115 M 146, 155, 139 P 2d 528; Hardenburgh v. Hardenburgh 115 M 469, 487, 146 P 2d 151; Hendy v. Industrial Accident Board, 115 M 516, 519, 146 P 2d 324; State ex rel. Montgomery Ward & Co. v. District Court, 115 M 521, 525, 146 P 2d 1012; State ex rel. Stefonick v. District Court, 117 M 86, 97, 157 P 2d 96; In re Transportation of School Children, 117 M 618, 622, 161 P 2d 901; State ex rel. Bonner v. District Court, 122 M 464, 206 P 2d 166, 172; State v. 122 M 464, 206 P 2d 166, 172; State v. Bain, 130 M 90, 295 P 241, 244.

Collateral References

Statutes = 188, 191, 192. 82 C.J.S. Statutes §§ 329, 330. 50 Am. Jur. 204, Statutes, § 225 et seq.

(16) Certain words defined. The following words when used 19-103. in the Revised Codes of Montana of 1947, or in any act amendatory of or supplemental to said codes, shall have the following meanings and interpretations unless otherwise apparent from the context. The present tense includes the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural and the plural, the singular; the word person includes a corporation as well as a natural person; writing includes printing; oath includes affirmation or declaration, and every mode of oral statement under oath or affirmation is embraced in the term "testify," and every written one in the term "depose"; signature or subscription includes mark when the person cannot write, his name being written near it, and written by a person who writes his own name as a witness. The following words also have the signification attached to them in this section, unless otherwise apparent from the context.

- 1. The word "property" includes property real and personal.
- 2. The words "real property" are co-extensive with lands, tenements, hereditaments and possessory title to public lands.
- 3. The words "personal property" include money, goods, chattels, things in action and evidence of debt.
- 4. The word "year," means a calendar year, and a "month," a calendar month, unless otherwise expressed. Fractions of a year are to be computed by the number of months, thus, half a year is six (6) months. Fractions of a day are to be disregarded in computations which include more than one (1) day and involve no questions of priority.
- 5. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the territories, and the words "United States" may include the district and territories.
 - 6. The word "will" includes codicils.
- 7. The word "writ" signifies an order or precept in writing, issued in the name of the state, or of a court or judicial officer; and the word "process," a writ or summons issued in the course of judicial proceedings.
- 8. The word "vessel" when used in reference to shipping, includes ships of all kinds, steamboats and steamships, canal boats and every structure adapted to be navigated from place to place.
- 9. The term "peace officer" signifies any of the officers mentioned in section 94-4906.
- 10. The term "magistrate" signifies any one of the officers mentioned in section 94-4905.
 - 11. The word "several" means two (2) or more.
- 12. The words "third persons" include all who are not parties to the obligation or transaction concerning which the phrase is used.
- 13. Usage, is a reasonable and lawful public custom concerning transactions of the same nature as those which are to be affected thereby, existing at the place where the obligation is to be performed, and either known to the parties or so well established, general and uniform, that they must be presumed to have acted with reference thereto.
 - 14. The words "usual" and "customary" mean "according to usage."
- 15. The word "willfully" when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.
- 16. The words "neglect," "negligence," "negligent," and "negligently" import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.
- 17. The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.
- 18. The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

- 19. The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.
- 20. The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion, in any public or official capacity.
- 21. When the seal of a court or public officer is required by law to be affixed to any paper the word "seal" includes an impression of such seal upon the paper alone, or upon any substance attached to the paper capable of receiving a visible impression. The seal of a private person may be made in like manner, or by the scroll of a pen, or by writing the word "seal" against his name.
- 22. "Pledge," "mortgage," "conditional sale," "lien," "assignment," and like terms, when used in referring to a security interest in personal property, shall include a corresponding type of security interest under the Uniform Commercial Code—Secured Transactions.

History: En. Sec. 16, Pol. C. 1895; re-en. Sec. 16, Rev. C. 1907; amd. Sec. 4, Ch. 4, L. 1921; re-en. Sec. 16, R. C. M. 1921; amd. Sec. 1, Ch. 25, L. 1947; amd. Sec. 11-114, Ch. 264, L. 1963. Cal. Pol. C. Sec. 17.

Compiler's Note

Sections 94-4905 and 94-4906, referred to in subdivisions 9 and 10 of this section, have been repealed. For similar provisions in current law, see secs. 95-208 and 95-210.

Malice

The institution of a criminal proceeding for passing a fraudulent check, which was in fact good, in order to collect on the check, was a malicious act. Rickman v. Safeway Stores, Inc., 124 M 451, 227 2d 607, 610.

Where defendant's workmen in digging ditch negligently struck sewer line and left it open overnight so that sewage seeped into the basement of plaintiff's motel, but when notified of the damage, workmen did everything they could to help clear out basement, there was not sufficient evidence of willful conduct to warrant an instruction to the jury under section 17-208 on exemplary damages. Spackman v. Ralph M. Parsons Co., — M—, 414 P 2d 918.

Masculine, Feminine and Neuter Gender

Words used in the codes in the masculine gender included the feminine. Our statute therefore, declares that the phrase "Imputes to him impotence or want of chastity" would apply to the feminine as well as the masculine. Kosonen v. Waara, 87 M 24, 32, 285 P 668.

Negligence

"Negligence is the failure to do what a

reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done," and where plaintiff's property was damaged by the dropping of fire retardant from airplanes and at the trial he failed to show the lack of due care under the circumstances, the trial court properly nonsuited plaintiff upon defendant's motion. Stocking v. Johnson Flying Service, 143 M 61, 387 P 2d 312.

Res ipsa loquitur does not relieve the plaintiff of the burden of proving actionable negligence nor is it sufficient that he show that he was injured and that the instrumentality which caused his injury was in the control of the defendant; he must also show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care. Stocking v. Johnson Flying Service, 143 M 61, 387 P 2d 312.

Person

Though the term "person" ordinarily refers to a living human being—a natural person—the definition given it by this section and other sections of the codes includes corporations as well as natural persons. In re Beck's Estate, 44 M 561, 572, 121 P 784, 121 P 1057.

A logging corporation acting in the capacity of an independent contractor is not a "person" as set forth in section 45-401, and is not entitled to a logger's lien thereunder. Jack Long Logging Co. v. Pyramid Mountain Lumber, Inc., 143 M 87, 387

P 712.

Prescription and Adverse Possession

The doctrine of prescription pertains to acquisition of a nonpossessory interest

while the doctrine of adverse possession pertains to the acquisition of a possessory interest; the two terms are entirely different but the interests are determined in a similar manner. Brannon v. Lewis and Clark County, 143 M 200, 387 P 2d 706.

Real Property

The legislature has classed an unpatented quartz lode mining claim as real estate, and has provided the same remedies for the protection and enforcement of rights pertaining to it, with the same forms of procedure as it has provided for the protection and enforcement of rights pertaining to other real estate. State ex rel. Baker v. District Court, 24 M 330, 333, 61 P 882.

Residence

The rules set forth in section 83-303 are guides for interpretation of the meaning of "residence" which must be applied to each case in the light of the facts of that case; they are not a definition. McCarthy v. Montana Power Co., 143 M 134, 387 P 2d 438.

Singular and Plural Numbers

The singular number when used in this code may include the plural, and the plural

the singular; and a statute requiring the notice of a school election to contain "the time and place of holding the election" may designate different "places." Hauswirth v. Mueller, 25 M 156, 161, 64 P 324. See also Mitchell v. Banking Corp. of Montana, 81 M 459, 464, 264 P 127.

References

Helena Water Works Co. v. Settles, 37 M 237, 239, 95 P 838; Williard v. Federal Surety Co. 91 M 465, 471, 8 P 2d 633; State ex rel. Tillman v. District Court, 101 M 176, 182, 53 P 2d 107; State ex rel. Clark v. District Court, 103 M 145, 147, 61 P 2d 836; State ex rel. Freebourn v. Merchants' Credit Service, Inc., 104 M 76, 101, 66 P 2d 337; Welsh v. Roehm, 125 M 517, 241 P 2d 816, 820; Clark v. Clark, 16 M 9, 242 P 2d 992, 993; In re Hansen's Estate, 126 M 522, 254 P 2d 1073, 1075; Brown v. Grenz, 127 M 49, 257 P 2d 246, 248; State ex rel. Burns v. Lacklen, 129 M 243, 284 P 2d 998, 1001; Ruona v. City of Billings, 136 M 554, 323 P 2d 29, 30; Cruse v. Clawson, 137 M 439, 352 P 2d 989, 995.

Collateral References

Statutes 188, 198, 199. 82 C.J.S. Statutes §§ 329, 338, 340.

19-104. (8782) "Heretofore" and "hereafter," meaning of. Whenever the term "heretofore" occurs in any statute, it shall be construed to mean any time previous to the day such statute shall take effect; and whenever the word "hereafter" occurs, it shall be construed to mean the time after the statute containing the term shall take effect.

History: En. Sec. 4670, Civ. C. 1895; re-en. Sec. 6232, Rev. C. 1907; re-en. Sec. 8782, R. C. M. 1921.

Collateral References

Statutes 199, 234½, 261 et seq. 82 C.J.S. Statutes §§ 319, 338, 412.

19-105. (8780) Notice, actual and constructive. Notice is:

- 1. Actual—which consists in express information of a fact.
- 2. Constructive—which is imputed by law.

History: En. Sec. 4666, Civ. C. 1895; re-en. Sec. 6228, Rev. C. 1907; re-en. Sec. 8780, R. C. M. 1921. Cal. Civ. C. Sec. 18. Based on Field Civ. C. Secs. 2009, 2010.

Constructive Notice

Constructive notice, notice implied by law, is analogous to a summons and serves the same purpose. Oliveri v. Maroncelli, 94 M 476, 479, 22 P 2d 1054.

References

Trerise v. Bottego, 32 M 244, 249, 79 P 1057; Hoppin v. Long, 74 M 558, 573, 241 P 636; Angus v. Mariner, 85 M 365, 374, 278 P 996; Pierce v. Pierce, 108 M 42, 47, 89 P 2d 269.

Collateral References

Notice \$1-6. 66 C.J.S. Notice § 7.

19-106. (8781) Constructive notice. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself, in all cases in which, by prosecuting such inquiry, he might have learned such facts.

History: En. Sec. 4667, Civ. C. 1895; 8781, R. C. M. 1921. Cal. Civ. C. Sec. 19. re-en. Sec. 6229, Rev. C. 1907; re-en. Sec. Based on Field Civ. C. Sec. 2011.

Excavation of City Street

Where plumber obtained license from city for the excavation and installation of a service pipe from street to residence, the city had notice of such excavation at time of granting such permission, and further notice to city of existence of such excavation was unnecessary to charge city with liability for damage resulting from unguarded excavation. Ledbetter v. City of Great Falls, 123 M 270, 213 P 2d 246, 13 ALR 2d 903.

Failure To Make Inquiry

Defendant, in an action to quiet title, who relied upon an assignment of a certificate of sale and subsequent sheriff's deed to real property sold on foreclosure, had sufficient notice of the facts and circumstances which subsequently resulted in a judgment setting aside the mortgage as fraudulent, to put him upon inquiry before taking the assignment and to make applicable the rule that failure to make inquiry which, if pursued, would have led to actual knowledge, will deprive one of the character of a bona fide purchaser. Teisinger v. Hardy, 91 M 9, 21, 5 P 2d 219.

Judgment Record

The record of a money judgment against Mrs. C. J. E. cannot be held to have imparted constructive notice to a purchaser of real property from Anna E., the record title holder, that the property was impressed with a lien of the judgment, unless the purchaser had actual knowledge that Mrs. C. J. E. and Anna E. were the same person. Poulos v. Lyman Bros. Co., 63 M 561, 208 P 598.

Knowledge by Agent of Facts Puts Principal on Inquiry

Where agent of insurance company issuing indemnity policy specifying plaintiff as sole tenant of a building in fact knew the premises to be occupied by more than one tenant, this was sufficient to impute notice to the company, under this section, that the premises were not wholly in the care and custody of a single tenant. Curtis v. Zurich General Accident & Liability Ins. Co., 108 M 275, 279, 89 P 2d 1038.

Where prospective mortgagees were informed by their agent that prospective mortgagor owed numerous debts, and that such mortgagor had acquired the branded cattle involved under contract, though the contract was unrecorded, mortgagees were required in exercise of ordinary prudence to make inquiry from some source other than mortgagor as to ownership of the cattle brand and of the cattle. Merrion v. Humphreys, 119 M 495, 176 P 2d 665, 669.

Notice of Later Agreements Not Affecting Title

Evidence relating to transactions occurring after the consummation of a contract of lease of oil land and with which plaintiff and his grantor had nothing to do was inadmissible under section 93-401-5, in an action to quiet title. Whatever notice plaintiff may have had of these later agreements was ineffectual to diminish or affect the title which he received. Nadeau v. Texas Co., 104 M 558, 568, 69 P 2d 586, 593, 111 ALR 874.

Ownership of Property

A bank, holding money as bailee or pledge holder, which receives notice that one other than the bailor or pledgor is the true owner thereof but notwithstanding such notice delivers it to a person other than the claimant, may be held liable for the amount thereof. Maser v. Farmers' & Merchants' Bank of Winnett, 90 M 33, 39, 300 P 207.

Rule of Chancery

This section embodies an old rule of chancery. Trerise v. Bottego, 32 M 244, 248, 79 P 1057; Yale Oil Corp. v. Sedlacek, 99 M 411, 43 P 2d 887.

Unrecorded Instrument

Evidence held insufficient to establish constructive notice in defendant city of an unrecorded grant of a portion of a water right made prior to its purchase of the entire right by defendant. Custer Consol. Mines Co. v. City of Helena, 52 M 35, 42, 156 P 1090.

In an action to foreclose a second mortgage on real property and to have it declared superior to a prior one, unrecorded at the time plaintiff placed his mortgage of record, plaintiff having been advised by language in his mortgage to the effect that it was "subject to a first mortgage heretofore made" on the property, he had actual notice of the prior lien; he was chargeable with notice of all material facts which an inquiry suggested by the recital would have disclosed, and with such notice he proceeded at his peril, even though the former instrument was not yet acknowledged or could be considered imperfect when he placed his mortgage on record. Angus v. Mariner, 85 M 365, 374, 278 P 996.

In action for reformation of deed, objection to introduction in evidence of contract which was not recorded prior to purchase of land by defendant on ground that no evidence had been introduced to show lack of good faith or notice on part of defendant was properly overruled when such evidence was offered later. Strack v. Federal Land Bank of Spokane, 124 M 19, 218 P 2d 1052, 1055.

References

Hastings v. Wise, 89 M 325, 341, 297 P 482; Pierce v. Pierce, 108 M 42, 47, 89 P 2d 269; Kenney v. Bridges, 123 M 95, 208 P 2d 475, 478.

Collateral References

Notice 5. 66 C.J.S. Notice § 6.

19-107. (10) Legal holidays and business days defined. The following are legal holidays in the state of Montana, to wit: Every Sunday; the first day of January (New Year's Day); the twelfth day of February (Lincoln's Birthday); the twenty-second day of February (Washington's Birthday); the thirtieth day of May (Memorial Day); the fourth day of July (Independence Day); the first Monday of September (Labor Day); the twelfth day of October (Columbus Day); the eleventh day of November (Veterans' Day); the twenty-fifth day of December (Christmas Day); every day on which a general election is held throughout the state and every day appointed by the president of the United States or by the governor of this state for a public fast, thanksgiving or holiday. If any of the holidays herein enumerated (except Sunday) fall upon a Sunday, the Monday following is a holiday. All other days than those herein mentioned are to be deemed business days for all purposes, except as herein provided.

Whenever any bank in the state of Montana elects to remain closed and refrains from the transaction of business on Saturday, pursuant to authority for permissive closing on Saturdays by virtue of the laws of the state, legal holidays for such bank during the year of such election are hereby limited to the following holidays, and no other holidays, viz.: Every Sunday; the first day of January (New Year's Day); the thirtieth day of May (Memorial Day); the fourth day of July (Independence Day); the first Monday of September (Labor Day); the twenty-fifth day of December (Christmas Day); and every day appointed by the president of the United States of America or by the governor of the state of Montana for a public fast, thanksgiving or holiday; provided, however, that any bank practicing Saturday closing in compliance with law may remain closed and refrain from the transaction of business on Saturdays, notwithstanding that a Saturday may coincide with a legal holiday other than one of the holidays designated above for banks practicing Saturday closing in compliance with law, and provided further that it shall be optional for any bank, whether practicing Saturday closing or not, to observe as a holiday and to be closed on any day upon which a general election is held throughout the state of Montana and on the eleventh day of November (Veterans' Day) and on any local holiday which historically or traditionally or by proclamation of a local executive official or governing body is established as a day upon which businesses are generally closed in the community in which the bank is located.

History: Ap. p. Sec. 10, Pol. C. 1895; re-en. Sec. 10, Rev. C. 1907; amd. Sec. 1, Ch. 21, 1921; re-en. Sec. 10, R. C. M. 1921; amd. Sec. 1, Ch. 209, L. 1955; amd. Sec. 1, Ch. 6, L. 1965. Cal. Pol. C. Secs. 10-11.

NOTE.—Columbus Day created by chapter 22, Laws of 1909; Lincoln's Birthday, chapter 11, Laws of 1909.

Cross-References

School holidays, sec. 75-2204.
Validity of transactions on holiday, sec. 5-1042.

City Ordinance

As more than sixty holidays during the year are provided for by this section, an ordinance making it unlawful to keep

open a pawnshop, loan office, or secondhand store after six o'clock p. m., except on days preceding a holiday, when they may be kept open till ten o'clock p. m., will, in the absence of clear proof to the contrary, be held reasonable. City of Butte v. Paltrovich, 30 M 18, 24, 75 P 521. Collateral References
Holidays = 1.
40 C.J.S. Holidays § 2.
50 Am. Jur. 802, Sundays and Holidays,
§ 3.

19-108. (11) Provisions of school code excepted. Nothing herein contained shall be deemed to amend or change the provisions of section 1300 of chapter 76 of the laws of the thirteenth legislative assembly of Montana of 1913 (section 75-2204), said section being hereby expressly declared to define legal holidays for school purposes only.

History: En. Sec. 2, Ch. 21, L. 1921; re-en. Sec. 11, R. C. M. 1921.

Collateral References

Schools and School District 162. 79 C.J.S. Schools and School District 483.

19-109. (12) Certain acts may be done on day following holiday. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed.

History: En. Sec. 12, Pol. C. 1895; reen. Sec. 12, Rev. C. 1907; re-en. Sec. 12, R. C. M. 1921. Cal. Pol. C. Sec. 13.

Construction of Section

Instead of embodying a prohibition, this section merely prevides an extra day of grace. Any of the enumerated acts may be done lawfully on a holiday, but are in time if not done until the next business day. State ex rel. Hay v. Alderson, 49 M 387, 410, 142 P 210.

Public Act Performed on Sunday

There is no prohibition against the performance of any public act on Sunday, as such. State ex rel. Hay v. Alderson, 49 M 387, 410, 142 P 210, distinguished in 120 M 380, 385, 186 P 2d 220.

Collateral References Time \$\infty\$=10. 86 C.J.S. Time \\$ 12.

19-110. (13) Seal defined. When the seal of a court, public officer, or person is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto.

History: En. Sec. 13, Pol. C. 1895; reen. Sec. 13, Rev. C. 1907; re-en. Sec. 13, R. C. M. 1921. Cal. Pol. C. Sec. 14.

Collateral References Seals \$\infty\$ 3. 79 C.J.S. Seals \$ 3.

19-111. (526) Great seal. The great seal of the state is as follows: A central group representing a plow, a miner's pick and shovel; upon the right representation of the great falls of the Missouri river; upon the left mountain scenery, and underneath the words "Oro y Plata." The seal must be two and one-half inches in diameter, and surrounded by these words: "The Great Seal of the State of Montana."

History: En. Sec. 1, p. 42, L. 1893; re-en. Sec. 1130, Pol. C. 1895; re-en. Sec. 430, Rev. C. 1907; re-en. Sec. 526, R. C. M. 1921.

Collateral References States©⇒23. 81 C.J.S. States § 28.

19-112. (527) Seals of executive officers. Each of the executive and state officers of the state must have a seal. Such seal must contain the

same representations and motto as is found on the great seal, and must be two inches in diameter, surrounded by the words "State of Montana" (giving the title of the office, "Secretary of State," "State Treasurer," etc.). An impression of the seal of executive and state officers must be filed in the office of the secretary of state.

History: En. Sec. 1131, Pol. C. 1895; re-en. Sec. 431, Rev. C. 1907; re-en. Sec. 527, R. C. M. 1921.

Collateral References States@=23. 81 C.J.S. States § 59.

19-113. (528) State flag. There is hereby established a "State Flag of Montana."

History: En. Sec. 1, Ch. 42, L. 1905; re-en. Sec. 432, Rev. C. 1907; re-en. Sec. 528, R. C. M. 1921.

Collateral References States©=23. 36A C.J.S. Flags § 2.

19-114. (529) Design of state flag. The "State Flag of Montana" shall be a flag having a blue field, with a representation of the great seal of the state in the center, and with golden fringe along the upper and lower borders of the flag; the same being the flag borne by the First Montana Infantry, U. S. V., in the Spanish-American war, with the exception of the device, "1st Montana Infantry, U. S. V."

History: En. Sec. 2, Ch. 42, L. 1905; re-en. Sec. 433, Rev. C. 1907; re-en. Sec. 529, R. C. M. 1921.

Collateral References States©=23. 36A C.J.S. Flags § 2.

19-115. (530) Bitterroot state floral emblem. The flower known as lewisia rediviva (bitterroot) shall be the floral emblem of the state of Montana.

History: En. Sec. 3282, Pol. C. 1895; re-en. Sec. 2097, Rev. C. 1907; re-en. Sec. 530, R. C. M. 1921.

19-116. (530.1) Western meadow lark designated as official bird of state. The bird known as the Western Meadow Lark, Sturnella-Neglecta (Audubon), as preferred by a referendum vote of Montana school children, shall be designated and declared to be the official bird of the state of Montana.

History: En. Sec. 1, Ch. 149, L. 1931.

19-117. (530.2) Official map of Montana. The map of the state of Montana issued by the board of railroad commissioners of Montana shall be and the same hereby is designated as the official map of the state of Montana.

History: En. Sec. 1, Ch. 9, L. 1927.

Judicial Notice

The courts of this state will take judicial notice of the territorial limits of the

political subdivisions of the state as such limits are shown and depicted on the official map. State v. Williams, 122 M 279, 202 P 2d 245, 246; State v. Peters, 146 M 188, 405 P 2d 642, 648.

19-118. (530.3) Custody of plates for map—corrections. The engraved stone plate from which the editions of said map are from time to time made, and in which the state of Montana now has an investment of more than eight thousand (\$8,000.00) dollars shall be and remain in the custody of said board of railroad commissioners, and shall be corrected from edition to

edition by said board by the inclusion thereon of all proper current map data in accordance with the basic plan of such map.

History: En. Sec. 2, Ch. 9, L. 1927.

19-119 to 19-121. Repealed—Chapter 47, Laws of 1963.

Repeal

These sections (Preamble, Secs. 1, 2, Ch. 75, L. 1947; Secs. 1, 2, Ch. 96, L. 1955; Sec. 15, Ch. 97, L. 1961), relating to the Montana fine arts' commission and the Charles M. Russell statue, were repealed

by Sec. 14, Ch. 47, Laws 1963. Section 227, Ch. 147, Laws 1963, purported to amend section 19-121; however, under the rule of section 43-515, this amendment was void.

19-122. Certified and registered mail. For purposes of legal notification, the term "registered mail" includes registered or certified mail in the Revised Codes of Montana, 1947.

History: En. Sec. 1, Ch. 5, L. 1967.

CHAPTER 2

PUBLICATION OF NOTICE BY RADIO OR TELEVISION

Section 19-201. Supplemental publication of notice by radio or television—manner in which made.

19-202. Copy or transcription of broadcast—period for which retained.

19-203. Proof of publication by broadcast.

19-201. Supplemental publication of notice by radio or television—manner in which made. Any official of the state or any of its political subdivisions who is required by law to publish any notice required by law may supplement such publication by a radio or television broadcast of a summary of such notice, or by both of such broadcasts, when, in his judgment, the public interest will be served. The summary of such notice only shall be read with no reference to any person by name then a candidate for political office, and such announcements shall be made only by duly employed personnel of the station from which such broadcast emanates, and announcements by political subdivisions may be made only by stations situated within the county of origin of the legal notice, unless no broadcast station exists in such county, in which case announcements may be made by a station or stations situated in any county other than the county of origin of the legal notice.

History: En. Sec. 1, Ch. 149, L. 1963.

19-202. Copy or transcription of broadcast—period for which retained. Each radio or television station broadcasting any summary of a legal notice shall for a period of six (6) months subsequent to such broadcast retain at its office a copy or transcription of the text of the summary as actually broadcast, which shall be available for public inspection.

History: En. Sec. 2, Ch. 149, L. 1963.

19-203. Proof of publication by broadcast. Proof of publication of a summary of any notice by radio or television broadcast shall be by affidavit of the manager, an assistant manager or a program director of the radio or television station broadcasting the same.

History: En. Sec. 3, Ch. 149, L. 1963.

TITLE 20

DEPOSIT

Chapter 1. Nature and class of deposit-obligations of depositary, 20-101 to 20-112.

2. Deposit for keeping—gratuitous deposit, 20-201 to 20-212.

3. Deposit for keeping—storage—unclaimed property, 20-301 to 20-314.

4. Deposit for keeping—finding—lost property, 20-401 to 20-416.

5. Deposit for exchange, 20-501.

CHAPTER 1

NATURE AND CLASS OF DEPOSIT—OBLIGATIONS OF DEPOSITARY

Section 20-101. Deposit-kinds of.

20-102. Voluntary deposit-how made. 20-103. Involuntary deposit-how made.

20-104. Involuntary deposit—duty of involuntary depositary.

20-105. Deposit for safekeeping defined. 20-106. Deposit for exchange defined.

20-107. Depositary must deliver on demand. 20-108. No obligation to deliver without demand.

20-109. Place of delivery.

20-110. Notice to owner of adverse claim.

20-111. Notice to owner of thing wrongfully detained.

20-112. Delivery of thing owned jointly, etc.

20-101. (7636) **Deposit—kinds of.** A deposit may be voluntary or involuntary; and for safekeeping or for exchange.

History: En. Sec. 2440, Civ. C. 1895; re-en. Sec. 5133, Rev. C. 1907; re-en. Sec. 7636, R. C. M. 1921. Cal Civ. C. Sec. 1813. Field Civ. C. Sec. 907.

Cross-Reference

Seller of personal property as depositary for hire until delivery, sec. 74-301.

Collateral References

Bailments 1, 2; Depositaries 1, 3. 8 C.J.S. Bailments §§ 1, 7; 26A C.J.S. Depositaries § 2. 8 Am. Jur. 2d 909, Bailments, § 5.

20-102. (7637) Voluntary deposit—how made. A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depositarv.

History: En. Sec. 2441, Civ. C. 1895; re-en. Sec. 5134, Rev. C. 1907; re-en. Sec. 7637, R. C. M. 1921. Cal. Civ. C. Sec. 1814. Field Civ. C. Sec. 908.

Collateral References

Liability for loss of hat, coat, or other property deposited by customers in place of business. 1 ALR 2d 802.

- 20-103. (7638) Involuntary deposit—how made. An involuntary deposit is made:
- 1. By the accidental leaving or placing of personal property in the possession of any person, without negligence on the part of the owner; or,
- 2. In cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the owner of personal property committing it, out of necessity, to the care of any person.

History: En. Sec. 2442, Civ. C. 1895; re-en. Sec. 5135, Rev. C. 1907; re-en. Sec. 7638, R. C. M. 1921. Cal. Civ. C. Sec. 1815. Field Civ. C. Sec. 909.

Collateral References

8 Am. Jur. 2d 912, Bailments, § 8; 34 Am. Jur. 636, Lost Property, § 7.

20-104. (7639) Involuntary deposit—duty of involuntary depositary. The person with whom a thing is deposited in the manner described in the last section is bound to take charge of it, if able to do so.

History: En. Sec. 2443, Civ. C. 1895; re-en. Sec. 5136, Rev. C. 1907; re-en. Sec. 7639, R. C. M. 1921. Cal. Civ. C. Sec. 1816. Field Civ. C. Sec. 910.

Collateral References

Bailments 10-14; Depositaries 4. 8 C.J.S. Bailments §§ 26-29; 26A C.J.S. Depositaries § 5.

20-105. (7640) Deposit for safekeeping defined. A deposit for keeping is one in which the depositary is bound to return the identical thing deposited.

History: En. Sec. 2444, Civ. C. 1895; re-en. Sec. 5137, Rev. C. 1907; re-en. Sec. 7640, R. C. M. 1921. Cal. Civ. C. Sec. 1817. Field Civ. C. Sec. 911.

Collateral References

Bailments 22, 23; Depositaries 3, 4. 8 C.J.S. Bailments §§ 7, 37; 26A C.J.S. Depositaries §§ 2, 5.

20-106. (7641) Deposit for exchange defined. A deposit for exchange is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited.

History: En. Sec. 2445, Civ. C. 1895; re-en. Sec. 5138, Rev. C. 1907; re-en. Sec. 7641, R. C. M. 1921. Cal. Civ. C. Sec. 1818. Field Civ. C. Sec. 912.

Acceptance of Deposit

By accepting a deposit made for the purpose of exchange, a bank becomes the debtor of the depositor. Stadler v. First Nat. Bank of Helena, 22 M 190, 215, 56 P 111; Murphy v. Nett, 51 M 82, 87, 149 P 713; In re Williams' Estate, 55 M 63, 70, 173 P 790, 1 ALR 1639.

Loan for Exchange

Where a party let defendant have a check under an agreement that he would use the proceeds in his own business for cashing miners' pay checks and repay the amount on a certain day, defendant was not guilty of larceny as bailee where he used it for other purposes and did not repay it, as the transaction was a loan for exchange and the title passed to defendant. State v. Karri, 51 M 157, 162, 149 P 956, distinguished in 140 M 305, 309, 371 P 2d 7.

20-107. (7642) Depositary must deliver on demand. A depositary must deliver the thing to the person for whose benefit it was deposited, on demand, whether the deposit was made for a specified time or not, unless he has a lien upon the thing deposited, or has been forbidden or prevented from doing so by the real owner thereof, or by the act of the law, and has given the notice required by section 20-110.

History: En. Sec. 2450, Civ. C. 1895; re-en. Sec. 5139, Rev. C. 1907; re-en. Sec. 7642, R. C. M. 1921. Cal. Civ. C. Sec. 1822. Field Civ. C. Sec. 913.

Preservation of Property

In the absence of a special contract with reference to the bailment, a bailee

is not liable so long as he uses ordinary care; but it is incumbent upon him, in an action for failure to redeliver two horses as agreed, to show that he did use that degree of care for the preservation of the property. Shropshire v. Sidebottom, 30 M 406, 408, 76 P 941.

20-108. (7643) No obligation to deliver without demand. A depositary is not bound to deliver a thing deposited without demand, even where the deposit is made for a specified time.

History: En. Sec. 2451, Civ. C. 1895; re-en. Sec. 5140, Rev. C. 1907; re-en. Sec.

7643, R. C. M. 1921. Cal. Civ. C. Sec. 1823. Field Civ. C. Sec. 914.

Application of Section

This section refers only to the obligation resting upon the depositary to deliver; it cannot be applied in resisting the payment of interest on moneys deposited to indemnify sureties on a bond against loss. Leggat v. Palmer, 39 M 302, 308, 102 P 327.

Bank Deposit

By a deposit, other than special, in a bank, the money becomes the property of the bank, the relation of debtor and creditor is created, and a contract is implied that an equivalent sum shall be paid to the depositor upon demand therefor. Stadler v. First Nat. Bank of Helena, 22 M 190, 215, 56 P 111. See Cassidy v. Slemons & Booth, 41 M 426, 428, 109 P 976.

Certificate of Deposit

In a cause of action counting on a certificate of deposit, a demand, if necessary, must be alleged in the complaint. Cassidy

v. Slemons & Booth, 41 M 426, 429, 109 P 976.

Denial of Liability

The general rule that where money is to become due only after demand, it is necessary for plaintiff to allege, and prove, that this requirement had been met, does not apply where defendant denies all liability. Under such circumstances a demand would be useless, and hence is not required by law. Judith Inland Transportation Co. v. Williams, 36 M 25, 28, 91 P 1061; Cassidy v. Slemons & Booth, 41 M 426, 430, 109 P 976.

Waiver of Demand

A cause of action does not arise in favor of a depositor until demand and refusal, unless the depositary has waived demand. Stadler v. First Nat. Bank of Helena, 22 M 190, 216, 56 P 111; Cassidy v. Slemons & Booth, 41 M 426, 428, 109 P 976.

20-109. (7644) Place of delivery. A depositary must deliver the thing deposited at his residence or place of business, as may be most convenient for him.

History: En. Sec. 2452, Civ. C. 1895; 7644, R. C. M. 1921. Cal. Civ. C. Sec. 1824. re-en. Sec. 5141, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 915.

20-110. (7645) Notice to owner of adverse claim. A depositary must give prompt notice to the person for whose benefit the deposit was made, of any proceedings taken adversely to his interest in the thing deposited, which may tend to excuse the depositary from delivering the thing to him.

History: En. Sec. 2453, Civ. C. 1895; re-en. Sec. 5142, Rev. C. 1907; re-en. Sec. 7645, R. C. M. 1921. Cal. Civ. C. Sec. 1825. Field Civ. C. Sec. 916.

Judgment against Bank for Deposit

Where a special administratrix had a deposit as such in a bank, and another claiming to have been appointed special administrator, made demand on the bank for the payment of the deposit, and the

bank notified the depositor of the demand and was requested to refuse the demand and retain the deposit in the depositor's name, and thereupon the demandant sued the bank, and, after the removal by the depositor, demandant recovered judgment against the bank for the deposit and interest from the date of the demand, the depositor was not liable to the bank for the interest. Murphy v. Nett, 51 M 82, 88, 149 P 713.

20-111. (7646) Notice to owner of thing wrongfully detained. A depositary, who believes that a thing deposited with him is wrongfully detained from its true owner, may give him notice of the deposit; and if within a reasonable time afterwards he does not claim it, and sufficiently establish his right thereto, and indemnify the depositary against the claim of the depositor, the depositary is exonerated from liability to the person to whom he gave the notice, upon returning the thing to the depositor, or assuming, in good faith, a new obligation changing his position in respect to the thing, to his prejudice.

History: En. Sec. 2454, Civ. C. 1895; re-en. Sec. 5143, Rev. C. 1907; re-en. Sec.

7646, R. C. M. 1921. Cal. Civ. C. Sec. 1826. Field Civ. C. Sec. 917.

References

Maser v. Farmers' & Merchants' Bank of Winnett, 90 M 33, 40, 300 P 207.

Collateral References

Bailment 21: Depositaries 4. 8 C.J.S. Bailment § 40; 26A C.J.S. Depositaries § 5.

20-112. (7647) Delivery of thing owned jointly, etc. If a thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its delivery, the depositary may deliver to each his proper share thereof, if it can be done without injury to the thing.

History: En. Sec. 2455, Civ. C. 1895; 7647, R. C. M. 1921. Cal. Civ. C. Sec. re-en. Sec. 5144, Rev. C. 1907; re-en. Sec. 1827. Field Civ. C. Sec. 918.

CHAPTER 2

DEPOSIT FOR KEEPING-GRATUITOUS DEPOSIT

Section 20-201. Depositor must indemnify depositary.

20-202. Obligation of depositary of animals. 20-203. Obligations as to use of thing deposited.

20-204. Liability for damage arising from wrongful use. 20-205. Sale of thing in danger of perishing. 20-206. Injury to or loss of thing deposited. 20-207. Service rendered by depositary.

20-208. Extent of his liability for negligence.

20-209. Gratuitous deposit defined.

Nature of involuntary deposit. 20-210. 20-211. Degree of care required of gratuitous depositary.

20-212. His duties cease, when.

20-201. (7648) Depositor must indemnify depositary. A depositor must indemnify the depositary:

- 1. For all damage caused to him by the defects or vices of the thing deposited; and,
- 2. For all expenses necessarily incurred by him about the thing, other than such as are involved in the nature of the undertaking.

History: En. Sec. 2460, Civ. C. 1895; re-en. Sec. 5145, Rev. C. 1907; re-en. Sec. 7648, R. C. M. 1921. Cal. Civ. C. Sec. 1833. Field Civ. C. Sec. 919.

Collateral References

Bailment 19; Depositaries 4.

8 C.J.S. Bailment § 34; 26A C.J.S. Depositaries § 5.

Tort liability of bailee for theft by servant. 15 ALR 2d 829.

Liability of bailee of motorboat for damage to bailed property. 63 ALR 2d 355.

20-202. (7649) Obligation of depositary of animals. A depositary of living animals must provide them with suitable food and shelter, and treat them kindly.

History: En. Sec. 2461, Civ. C. 1895; re-en. Sec. 5146, Rev. C. 1907; re-en. Sec. 7649, R. C. M. 1921. Cal. Civ. C. Sec. 1834. Field Civ. C. Sec. 920.

Collateral References

Animals 22 et seq.; Depositaries 4.3 C.J.S. Animals § 17; 26A C.J.S. Depositaries § 5. 4 Am. Jur. 2d 316, Animals, § 69.

References

Kirk v. Smith, 48 M 489, 494, 138 P

(7650) Obligations as to use of thing deposited. A depositary may not use the thing deposited, or permit it to be used, for any purpose, without the consent of the depositor. He may not, if it is purposely fastened by the depositor, open it without the consent of the latter, except in case of necessity.

History: En. Sec. 2462, Civ. C. 1895; re-en. Sec. 5147, Rev. C. 1907; re-en. Sec. 7650, R. C. M. 1921. Cal. Civ. C. Sec. 1835. Field Civ. C. Sec. 921.

References

State ex rel. Olsen v. Sundling, 128 M 596, 281 P 2d 499, 502.

Collateral References

Bailment € 11-14; Depositaries € 24. 8 C.J.S. Bailment § 26; 26A C.J.S. Depositaries § 5. 8 Am. Jur. 2d 1049, Bailments, § 156.

20-204. (7651) Liability for damage arising from wrongful use. A depositary is liable for any damage happening to the thing deposited, during his wrongful use thereof, unless such damage must inevitably have happened though the property had not been used.

History: En. Sec. 2463, Civ. C. 1895; 7651, R. C. M. 1921. Cal. Civ. C. Sec. 1836. re-en. Sec. 5148, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 922.

20-205. (7652) Sale of thing in danger of perishing. If a thing deposited is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable, and retain the proceeds as a deposit, giving immediate notice of his proceedings to the depositor.

History: En. Sec. 2464, Civ. C. 1895; 7652, R. C. M. 1921. Cal. Civ. C. Sec. 1837. re-en. Sec. 5149, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 923.

20-206. (7653) Injury to or loss of thing deposited. If a thing is lost during its deposit, and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred, so far as he has information concerning them, or willfully misrepresents the circumstances to him, the depositary is presumed to have willfully, or by gross negligence, permitted the loss or injury to occur.

History: En. Sec. 2465, Civ. C. 1895; re-en. Sec. 5150, Rev. C. 1907; re-en. Sec. 7653, R. C. M. 1921, Cal. Civ. C. Sec. 1838. Based on Field Civ. C. Sec. 924.

Collateral References Bailment©=31 (1).

8 C.J.S. Bailments § 50.

Tort liability of bailee for theft by servant. 15 ALR 2d 829.

20-207. (7654) Service rendered by depositary. So far as any service is rendered by a depositary, or required from him, his duties and liabilities are prescribed by the chapter on employment and service.

History: En. Sec. 2466, Civ. C. 1895; re-en. Sec. 5151, Rev. C. 1907; re-en. Sec. 7654, R. C. M. 1921. Cal. Civ. C. Sec. 1839. Field Civ. C. Sec. 925.

Collateral References

Bailment 15; Depositaries 4. 8 C.J.S Bailments § 30; 26A C.J.S. Depositaries § 5.

20-208. (7655) Extent of his liability for negligence. The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth.

History: En. Sec. 2467, Civ. C. 1895; re-en. Sec. 5152, Rev. C. 1907; re-en. Sec. 7655, R. C. M. 1921, Cal. Civ. C. Sec. 1840. Based on Field Civ. C. Sec. 926.

Collateral References

Bailment © 32; Depositaries © 11. 8 C.J.S. Bailments § 55; 26A C.J.S. Depositaries §§ 6, 13. 8 Am. Jur. 2d 1083, Bailments, § 198. 20-209. (7656) Gratuitous deposit defined. Gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited.

History: En. Sec. 2480, Civ. C. 1895; re-en. Sec. 5153, Rev. C. 1907; re-en. Sec. 7656, R. C. M. 1921. Cal. Civ. C. Sec. 1844. Field Civ. C. Sec. 927.

Bank Holding Securities for Safekeeping without Compensation a Gratuitous Bailee

Where bank accepted Liberty bonds for safekeeping but made no charge therefor, contention that bank was not a gratuitous bailee because, by rendering such service, it would induce customers to deal with the bank in other matters for its profit, was improper in absence of evidence that the bank had sought or advertised for such deposits of valuable papers, and the bank was a gratuitous bailee. Boyd v. Harrison State Bank, 102 M 94, 105, 56 P 2d 724.

Demand for Return of Property

Where defendant's position with respect to property was that of a gratuitous bailee, a demand made upon him for the return of the property, and a refusal by him were prerequisites to the accrual of the plaintiff's right of action to recover the property. Gates v. Powell, 77 M 554, 560, 252 P 377.

References

Duckett v. Biggs, 57 M 443, 188 P 938; State ex rel. Olsen v. Sundling, 128 M 596, 281 P 2d 499, 502.

Collateral References

Bailment € 2; Depositaries 1, 3. 8 C.J.S. Bailments § 7; 26A C.J.S Depositaries § 2.

20-210. (7657) **Nature of involuntary deposit.** An involuntary deposit is gratuitous, the depositary being entitled to no reward.

History: En. Sec. 2481, Civ. C. 1895; re-en. Sec. 5154, Rev. C. 1907; re-en. Sec. 7657, R. C. M. 1921. Cal. Civ. C. Sec. 1845. Field Civ. C. Sec. 928.

References

Kirk v. Smith, 48 M 489, 494, 138 P 1088.

Collateral References

Bailment 2, 19; Depositaries 3.
8 C.J.S. Bailments §§ 7, 34; 26A C.J.S. Depositaries § 2.

20-211. (7658) Degree of care required of gratuitous depositary. A gratuitous depositary must use at least slight care for the preservation of the thing deposited.

History: En. Sec. 2482, Civ. C. 1895; re-en. Sec. 5155, Rev. C. 1907; re-en. Sec. 7658, R. C. M. 1921. Cal. Civ. C. Sec. 1846. Field Civ. C. Sec. 929.

Degree of Care Required

Where Liberty bonds lost in bank robbery, after bank advised that robbery was scheduled, and failed to take precaution of safety devices with which equipped, the rule of "slight care" provided by this section was not met by proof that bank

exercised same degree of care of bailor's property as it did its own of like kind and value. Failure to use care situation demands, is gross negligence. Boyd v. Harrison State Bank, 102 M 94, 105, 56 P 2d 724.

Collateral References

Bailment@12; Depositaries@4. 8 C.J.S. Bailments § 28; 26A C.J.S. Depositaries § 5. 8 Am. Jur. 2d 1083, Bailments, § 198.

- 20-212. (7659) His duties cease, when. The duties of a gratuitous depositary cease:
 - 1. Upon his restoring the thing deposited to its owner; or,
- 2. Upon his giving reasonable notice to the owner to remove it, and the owner failing to do so within a reasonable time. But an involuntary depositary, under subdivision 2 of section 20-103, cannot give such notice until the emergency which gave rise to the deposit is past.

History: En. Sec. 2483, Civ. C. 1895; 7659, R. C. M. 1921. Cal. Civ. C. Sec. 1847. re-en. Sec. 5156, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 930.

CHAPTER 3

DEPOSIT FOR KEEPING-STORAGE-UNCLAIMED PROPERTY

Section 20-301. Deposit for hire.

20-302. Degree of care required of depositary for hire.

20-303. Rate of compensation for fraction of a week, etc.

20-304. Termination of deposit.

20-305. Termination of deposit-on payment of charges to become due.

20-306. Sale to pay costs of storage.20-307. Application of proceeds of sale.20-308. Storage of unclaimed property.

20-309. Property unclaimed within ninety days to be sold, how,

20-310. Proceeds unclaimed, where to go. 20-311. Carrier's responsibility ceases, when.

20-312. Property upon which advances are due may be sold, when.

20-313. Fees of officers.

20-314. Uniform Commercial Code—applicability.

20-301. (7660) Deposit for hire. A deposit not gratuitous is called storage. The depositary in such case is called a depositary for hire.

History: En. Sec. 2490, Civ. C. 1895; re-en. Sec. 5157, Rev. C. 1907; re-en. Sec. 7660, R. C. M. 1921. Cal. Civ. C. Sec. 1851. Field Civ. C. Sec. 931.

Collateral References

Bailment 2: Depositaries 1, 3.

8 C.J.S. Bailments \S 7; 26A C.J.S. Depositaries \S 2.

8 Am. Jur. 2d 912, Bailments, § 7.

Liability for loss of hat, coat, or other property deposited by customers in place of business. 1 ALR 2d 802.

Tort liability of bailee for theft by serv-

ant. 15 ALR 2d 829.

20-302. (7661) Degree of care required of depositary for hire. A depositary for hire must use at least ordinary care for the preservation of the thing deposited.

History: En. Sec. 2491, Civ. C. 1895; re-en. Sec. 5158, Rev. C. 1907; re-en. Sec. 7661, R. C. M. 1921. Cal. Civ. C. Sec. 1852. Field Civ. C. Sec. 932.

Ordinary Care

There is not necessarily any conflict between this section and section 20-107. The rule that a bailee for hire is charged only with ordinary care has not been changed. Shropshire v. Sidebottom, 30 M 406, 408, 76 P 941.

Ordinary Care-Burden of Proof

Under this section, a bailee for hire must use at least ordinary care for the preservation of the thing stored; if the article placed in storage is in good contition and returned in a damaged one, the presumption is that the bailee was negligent, and the burden is placed upon him

to prove that he used due care. Montana Leather Co. v. Colwell, 96 M 274, 276, 30 P 2d 473.

References

Dorall v. Davis, 139 M 69, 360 P 2d 409.

Collateral References

Bailment 14; Depositaries 4.

8 C.J.S. Bailments § 27; 26A C.J.S. Depositaries § 5.

8 Am Jur. 2d 1083, Bailments, § 198.

Tort liability of one renting or loaning airplane of another. 4 ALR 2d 1306.

One furnishing lockers for hire to patrons as a bailee subject to liability for loss of packages or goods placed therein. 19 ALR 2d 331.

20-303. (7662) Rate of compensation for fraction of a week, etc. In the absence of a different agreement or usage, a depositary for hire is entitled to one week's hire for the sustenance and shelter of living animals during any fraction of a week, and to half a month's hire for the storage of any other property during any fraction of a half month.

History: En. Sec. 2492, Civ. C. 1895; re-en. Sec. 5159, Rev. C. 1907; re-en. Sec. 7662, R. C. M. 1921. Cal. Civ. C. Sec. 1853. Field Civ. C. Sec. 933.

References

Kirk v. Smith, 48 M 489, 494, 138 P 1088.

20-304. (7663) Termination of deposit. In the absence of an agreement as to the length of time during which a deposit is to continue, it may be terminated by the depositor at any time, and by the depositary upon a reasonable notice.

History: En. Sec. 2493, Civ. C. 1895; 7663, R. C. M. 1921, Cal. Civ. C. Sec. re-en. Sec. 5160, Rev. C. 1907; re-en. Sec. 1854. Field Civ. C. Sec. 934.

20-305. (7664) Termination of deposit—on payment of charges to become due. Notwithstanding an agreement respecting the length of time during which a deposit is to continue, it may be terminated by the depositor on paying all that would become due to the depositary in case of the deposit so continuing.

History: En. Sec. 2494, Civ. C. 1895; 7664, R. C. M. 1921. Cal. Civ. C. Sec. 1855. re-en. Sec. 5161, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 935.

(7665) Sale to pay costs of storage. Any storage or commission merchant receiving personal property from any person for storage, and any common carrier of goods by whom any personal property is lawfully stored before or after the transportation thereof, may, after keeping the same in store for ninety days, in default of the payment of the storage or freight money on such personal property, advertise and sell the same at public auction to the highest bidder for eash, first giving notice of the time, the terms, and place of sale, and a description of the property to be sold, by publication in some newspaper published in the county where the property may be stored. Said notice shall be published at least once a week for four weeks next previous to the day of sale, and shall specify the amount due on the property to be sold. When a specified time has been agreed upon between the parties for the storage of said property, the same shall not be advertised until the expiration of the time agreed upon. Should there be no newspaper published in the county where such property is stored, then notice may be given in the newspaper published nearest thereto, in some other county, in this state. But no more of such property shall be sold than is necessary to pay the charges due, together with the costs.

History: Ap. p. Sec. 1, p. 544, Cod. Stat. 1871; re-en. Sec. 1179, 5th Div. Rev. Stat. 1879; re-en. Sec. 1983, 5th Div. Comp. Stat. 1887; amd. Sec. 2495, Civ. C. 1895; amd. Sec. 1, p. 153, L. 1901; re-en. Sec. 5162, Rev. C. 1907; re-en. Sec. 7665, R. C. M. 1921. Cal. Civ. C. Secs. 1856 and 1857.

Cross-References

Sale by innkeepers, sec. 34-104. Warehouse receipts, bills of lading and

other documents of title, secs. 87A-7-101 to 87A-7-603.

Collateral References

Carriers 197; Factors 47; Ware-housemen 29-33.

13 C.J.S. Carriers § 324 et seq.; 35 C.J.S. Factors § 45 et seq.; 93 C.J.S. Warehousemen and Safe Depositaries § 69.

13 Am. Jur. 2d 936, Carriers, § 468; 56 Am. Jur. 373, Warehouses, §§ 111-114.

20-307. (7666) Application of proceeds of sale. After paying the expenses of sale, including the publication of notice, the storage or commission merchant, or the carrier, shall be authorized, out of the proceeds arising from the sale of the property, to retain the amount due him for storage

or freight money, or both, due upon any such property, and the excess, if any, must be paid over to the person entitled to the proceeds thereof. All sales under this chapter shall vest the title to the property sold in the purchaser thereof.

History: Ap. p. Sec. 3, p. 545, Cod. Stat. 1871; re-en. Sec. 1181, 5th Div. Rev. Stat. 1879; re-en. Sec. 1895, 5th Div. Comp. Stat. 1887; amd. Sec. 2496, Civ. C. 1895; re-en. Sec. 2, p. 153, L. 1901; re-en. Sec. 5163, Rev. C. 1907; re-en. Sec. 7666, R. C. M. 1921.

Collateral References

Carriers 197 (7); Factors 47 (6); Warehousemen 33.

13 C.J.S. Carriers § 331; 35 C.J.S. Factors § 48; 93 C.J.S. Warehousemen and Safe Depositaries § 69.
56 Am. Jur. 374, Warehouses, § 114.

20-308. (7667) Storage of unclaimed property. When any goods, merchandise, or other property has been received by any railroad or express company, or other common carrier, commission merchants, or warehousemen, for transportation or safekeeping, and are not delivered to the owner, consignee, or other authorized person, the carrier, commission merchant, or warehouseman may hold or store the same with some responsible person until the freight and all just and reasonable charges are paid.

History: En. Sec. 2920, Pol. C. 1895; re-en. Sec. 2003, Rev. C. 1907; re-en. Sec. 7667, R. C. M. 1921, Cal. Pol. C. Sec. 3152.

20-309. (7668) Property unclaimed within ninety days to be sold, how. If no person calls for the property within ninety days from the receipt thereof, and pays freight and charges thereon, the carrier, commission merchant, or warehouseman may sell such property, or so much thereof, at auction to the highest bidder, as will pay freight and charges, first having given twenty days' notice of the time and place of sale to the owner, consignee, or consignor, when known, and by advertisement in a daily paper ten days (or if in a weekly paper, four weeks), published where such sale is to take place; and if any surplus is left after paying freight, storage, cost of advertising, and other reasonable charges, the same must be paid over to the owner of such property at any time thereafter, upon demand being made therefor or within sixty days after the sale.

History: En. Sec. 2921, Pol. C. 1895; re-en. Sec. 2004, Rev. C. 1907; re-en. Sec. 7668, R. C. M. 1921. Cal. Pol. C. Sec. 3153.

Collateral References

13 Am. Jur. 2d 936, Carriers, § 468; 56 Am. Jur. 373, Warehouses, §§ 111-114.

20-310. (7669) Proceeds unclaimed, where to go. If the owner or his agent fails to demand such surplus within sixty days of the time of such sale, then it must be paid into the county treasury, subject to the order of the owner.

History: En. Sec. 2922, Pol. C. 1895; re-en. Sec. 2005, Rev. C. 1907; re-en. Sec. 7669, R. C. M. 1921. Cal. Pol. C. Sec. 3154.

Collateral References Escheat©=3, 4. 30 C.J.S. Escheat §§ 2, 3.

20-311. (7670) Carrier's responsibility ceases, when. After the storage of goods, merchandise, or property, as herein provided, the responsibility of the carrier ceases, nor is the person with whom the same is stored liable for any loss or damage on account thereof, unless the same results from his negligence or want of proper care.

History: En. Sec. 2923, Pol. C. 1895; re-en. Sec. 2006, Rev. C. 1907; re-en. Sec. 7670, R. C. M. 1921. Cal. Pol. C. Sec. 3155.

Collateral References
Carriers 114.
13 C.J.S. Carriers § 333.

20-312. (7671) Property upon which advances are due may be sold, when. When any commission merchant or warehouseman receives on consignment produce, merchandise, or other property, and makes advances thereon, either to the owner or for freight and charges, he may, if the same is not paid to him within ninety days from the date of such advances, cause the produce, merchandise, or property, on which the advances were made, to be advertised and sold as provided herein.

History: En. Sec. 2924, Pol. C. 1895; re-en. Sec. 2007, Rev. C. 1907; re-en. Sec. 7671, R. C. M. 1921. Cal. Pol. C. Sec. 3156.

Collateral References

Factors \$47; Warehousemen \$29-33. 35 C.J.S. Factors §45 et seq.; 93 C.J.S. Warehousemen and Safe Depositories §§62, 85.

20-313. (7672) Fees of officers. The fees of officers under this chapter are the same as allowed for similar services in other cases provided in this code, to be paid by the taker-up or finder and recovered of the owner.

History: En. Sec. 2925, Pol. C. 1895; re-en. Sec. 2008, Rev. C. 1907; re-en. Sec. 7672, R. C. M. 1921. Cal. Pol. C. Sec. 3157.

Collateral References
Officers \$\infty\$ 94, 97.
67 C.J.S. Officers \$\infty\$ 83, 99.

20-314. Uniform Commercial Code—applicability. The provisions of this chapter apply only to the extent not otherwise provided for in the Uniform Commercial Code.

History: En. 20-314 by Sec. 11-116, Ch. 264, L. 1963.

Cross-Reference

Uniform Commercial Code, secs. 87A-1-101 to 87A-10-103.

CHAPTER 4

DEPOSIT FOR KEEPING-FINDING-LOST PROPERTY

Section 20-401. Obligation of finder.

20-402. Finder to notify owner.

20-403. Claimant to prove ownership.

20-404. Reward, etc., to finder.

20-405. Finder may put thing found on storage. 20-406. When finder may sell the thing found.

20-407. How sale is to be made.

20-408. Surrender of thing to the finder.

20-409. Thing abandoned.

20-410. Duty of person finding lost money, goods, etc. 20-411. Justice to appoint appraisers—duty of appraisers.

20-412. Justice to file list of appraisers.

20-413. Proceedings if no owner appears within six months.

20-414. Finder to restore property, when-owner may sue, when.

20-415. Finder failing to make discovery—penalty.

20-416. Proof-how made.

20-401. (7685) **Obligation of finder.** One who finds a thing lost is not bound to take charge of it, but if he does so he is thenceforth a depositary for the owner, with the rights and obligations of a depositary for hire.

History: En. Sec. 2520, Civ. C. 1895; 7685, R. C. M. 1921. Cal. Civ. C. Sec. re-en. Sec. 5178, Rev. C. 1907; re-en. Sec. 1864. Field Civ. C. Sec. 938.

Cross-Reference

Stolen property, disposition, secs. 95-712 to 95-716.

Compensation for Finding

In an action for compensation for finding, taking care of, and feeding a band of sheep, the plaintiff must recover on the basis of compensation alone; he is not entitled to recover a gratuity; but he can recover for his services, though the sheep have been mingled with other sheep, if he can show the value of the proportion of his time, labor, feed, etc., given to the estrays. Kirk v. Smith, 48 M 489, 492, 138 P 1088.

This section must be construed with section 20-404 and, when so construed, the terms of this section are made plain. The depositary for hire is only entitled to ordinary compensation, except in so far as this rule is modified by section 20-303. Kirk v. Smith, 48 M 489, 492, 138 P 1088.

Pleading and Proof

The complainant in an action on a liability or obligation imposed by special statute must state facts that bring the plaintiff squarely within its terms. Kirk v. Smith, 48 M 489, 492, 138 P 1088.

Assuming that sections 20-401 to 20-409 are applicable to the case of one who picks up estray domestic animals, takes care of and feeds them, a complaint which failed to allege that the animals were in fact lost did not state a cause of action under said sections. Kirk v. Smith, 48 M 489, 492, 138 P 1088.

Collateral References

Finding Lost Goods \$4.9.
36 C.J.S. Finding Lost Goods §§ 3, 4, 7.
34 Am. Jur. 635, Lost Property, § 6 et

20-402. (7686) Finder to notify owner. If the finder of a thing knows or suspects who is the owner, he must, with reasonable diligence, give him notice of the finding; and if he fails to do so, he is liable in damages to the owner, and has no claim to any reward offered by him for the recovery of the thing, or to any compensation for his trouble or expenses.

History: En. Sec. 2521, Civ. C. 1895; 7686, R. C. M. 1921. Cal. Civ. C. Sec. 1865. re-en. Sec. 5179, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 939.

20-403. (7687) Claimant to prove ownership. The finder of a thing may, in good faith, before giving it up, require reasonable proof of ownership from any person claiming it.

History: En. Sec. 2522, Civ. C. 1895; re-en. Sec. 5180, Rev. C. 1907; re-en. Sec. 7687, R. C. M. 1921. Cal. Civ. C. Sec. 1866. Field Civ. C. Sec. 940.

Collateral References

34 Am. Jur. 641, Lost Property, § 14.

20-404. (7688) Reward, etc., to finder. The finder of a thing is entitled to compensation for all expenses necessarily incurred by him in its preservation, and for any other service necessarily performed by him about it, and to a reasonable reward for keeping it.

History: En. Sec. 2523, Civ. C. 1895; re-en. Sec. 5181, Rev. C. 1907; re-en. Sec. 7688, R. C. M. 1921. Cal. Civ. C. Sec. 1867. Field Civ. C. Sec. 941.

Collateral References

46 Am. Jur. 107, Rewards, § 3.

20-405. (7689) Finder may put thing found on storage. The finder of a thing may exonerate himself from liability at any time by placing it on storage with any responsible person of good character, at a reasonable expense.

History: En. Sec. 2524, Civ. C. 1895; 7689, R. C. M. 1921. Cal. Civ. C. Sec. 1868. re-en. Sec. 5182, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 942.

20-406. (7690) When finder may sell the thing found. The finder of a thing may sell it, if it is a thing which is commonly the subject of sale, when the owner cannot, with reasonable diligence, be found, or, being found,

refuses upon demand to pay the lawful charges of the finder, in the following cases:

- 1. When the thing is in danger of perishing, or of losing the greater part of its value; or,
- 2. When the lawful charges of the finder amount to two-thirds of its value.

History: En. Sec. 2525, Civ. C. 1895; 7690, R. C. M. 1921. Cal. Civ. C. Sec. 1869. re-en. Sec. 5183, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 943.

20-407. (7691) How sale is to be made. A sale under the provisions of the last section must be made in the same manner as the sale of a thing pledged.

History: En. Sec. 2526, Civ. C. 1895; 7691, R. C. M. 1921. Cal. Civ. C. Sec. 1870. re-en. Sec. 5184, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 944.

20-408. (7692) Surrender of thing to the finder. The owner of a thing found may exonerate himself from the claims of the finder by surrendering it to him in satisfaction thereof.

History: En. Sec. 2527, Civ. C. 1895; 7692, R. C. M. 1921. Cal. Civ. C. Sec. 1868. re-en. Sec. 5185, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 945.

20-409. (7693) Thing abandoned. The provisions of this chapter have no application to things which have been intentionally abandoned by their owners.

History: En. Sec. 2528, Civ. C. 1895; re-en. Sec. 5186, Rev. C. 1907; re-en. Sec. 7693, R. C. M. 1921. Cal. Civ. C. Sec. 1872. Field Civ. C. Sec. 946.

References

Kirk v. Smith, 48 M 489, 492, 138 P 1088.

Collateral References

Abandonment € 7. 1 C.J.S. Abandonment § 9.

20-410. (7694) Duty of person finding lost money, goods, etc. If any person find any money, goods, things in action, or other personal property, or save any domestic animal from drowning or from starvation, when such property is of the value of ten dollars or more, he must inform the owner thereof, if known, and make restitution without compensation, further than a reasonable charge for saving and taking care thereof; but if the owner is not known to the party saving or finding such property, he must, within five days, make an affidavit before some justice of the peace of the county, stating when and where he found or saved such property, particularly describing it; and if the property was saved, particularly from what and how he saved the same, stating therein whether the owner of the property is known to him, and that he has not secreted, withheld, or disposed of any part of such property.

History: En. Sec. 2900, Pol. C. 1895; re-en. Sec. 1996, Rev. C. 1907; re-en. Sec. 7694, R. C. M. 1921. Cal. Pol. C. Sec. 3136.

Collateral References

34 Am. Jur. 635, Lost Property, § 6 et seq.

20-411. (7695) Justice to appoint appraisers—duty of appraisers. The justice must then summon three disinterested householders to appraise the same. The appraisers, or any two of them, must make two lists of the valuation and description of such property, and sign and make oath to the

same, and deliver one of the lists to the finder, and the other to the justice of the peace.

History: En. Sec. 2901, Pol. C. 1895; re-en. Sec. 1997, Rev. C. 1907; re-en. Sec. 7695, R. C. M. 1921, Cal. Pol. C. Sec. 3137.

20-412. (7696) Justice to file list of appraisers. The justice must file such list, and the finder must transmit a copy of the same to the county clerk of the county, who must record the same in a book known as the "Estray and Lost Property Book," within fifteen days, and the finder must at once set up at the courthouse door and four other public places in the township or city a copy of such valuation and a description of property.

History: En. Sec. 2902, Pol. C. 1895; re-en. Sec. 1998, Rev. C. 1907; re-en. Sec. 7696, R. C. M. 1921, Cal. Pol. C. Sec. 3138.

20-413. (7697) Proceedings if no owner appears within six months. If no owner appears and proves the property within six months, and the value thereof does not exceed twenty dollars, the same vests in the finder; but if the value exceeds twenty dollars, the finder must, within thirty days after setting up the list mentioned in the preceding section, cause a copy of the description to be inserted in some newspaper printed in the county if there be one, and if not, in some newspaper printed in the state, for three weeks; and if no owner prove the property within one year after such publication it vests in finder.

History: En. Sec. 2903, Pol. C. 1895; re-en. Sec. 1999, Rev. C. 1907; re-en. Sec. 7697, R. C. M. 1921. Cal. Pol. C. Sec. 3139.

20-414. (7698) Finder to restore property, when—owner may sue, when. If, within one year, an owner appears and proves the property and pays all reasonable charges, including fees of officers, the finder must restore the same to him. On failure to make restoration of such property, or the appraised value thereof, on being tendered such charges and fees, the owner may recover the same, or the value thereof, by civil action in any court having jurisdiction.

History: En. Sec. 2904, Pol. C. 1895; re-en. Sec. 2000, Rev. C. 1907; re-en. Sec. 7698, R. C. M. 1921, Cal. Pol. C. Sec. 3140.

20-415. (7699) Finder failing to make discovery—penalty. If any person find any money, property, or other valuable thing, and fail to make discovery of the same as required by this chapter, he forfeits to the owner double the value thereof.

History: En. Sec. 2905, Pol. C. 1895; re-en. Sec. 2001, Rev. C. 1907; re-en. Sec. 7699, R. C. M. 1921. Cal. Pol. C. Sec. 3141.

20-416. (7700) Proof—how made. The proof required by this chapter must be made before the county clerk with whom the list provided for herein is filed, and if he is satisfied therefrom that the person claiming to be is the owner, he must certify that fact under his hand and seal.

History: En. Sec. 2906, Pol. C. 1895; re-en. Sec. 2002, Rev. C. 1907; re-en. Sec. 7700, R. C. M. 1921. Cal. Pol. C. Sec. 3142.

CHAPTER 5

DEPOSIT FOR EXCHANGE

Section 20-501. Relations of the parties.

20-501. (7701) Relations of the parties. A deposit for exchange transfers to the depositary the title to the thing deposited, and creates between him and the depositor the relation of debtor and creditor merely.

History: En. Sec. 2540, Civ. C. 1895; re-en. Sec. 5187, Rev. C. 1907; re-en. Sec. 7701, R. C. M. 1921. Cal. Civ. C. Sec. 1878. Field Civ. C. Sec. 947.

Bank Deposit

By a deposit, other than special, in a bank, the money becomes the property of the bank, and the relation of debtor and creditor is created. Stadler v. First Nat. Bank of Helena, 22 M 190, 215, 56 P 111. By accepting a deposit for the purpose of exchange, a bank becomes the debtor

of the depositor. Murphy v. Nett, 51 M

82, 87, 149 P 713; In re Williams' Estate, 55 M 63, 70, 173 P 790.

References

Hanson Sheep Co. v. Farmers' & Traders' State Bank, 53 M 324, 334, 163 P 1151; Jensen v. Laurel Meat Co., 71 M 582, 590, 230 P 1081.

Collateral References

Depositaries 1: Exchange of Property

26A C.J.S. Depositaries § 2; 33 C.J.S. Exchange of Property § 1.

TITLE 21

DIVORCE

Chapter 1. Dissolution of marriage—divorce, 21-101 to 21-150.

CHAPTER 1

DISSOLUTION OF MARRIAGE—DIVORCE

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21-148. Poor woman may sue without costs.
21-149. Notice of application for alimony.
21-150. Divorces granted by other jurisdictions—when not recognized.

21-101. (5734) Marriage—how dissolved. Marriage is dissolved only:

By the death of one of the parties; or,

By a judgment of a court of competent jurisdiction.

History: En. Sec. 130, Civ. C. 1895; re-en. Sec. 3641, Rev. C. 1907; re-en. Sec. 5734, R. C. M. 1921. Cal. Civ. C. Sec. 90.

Cross-References

Advertising to procure divorce, penalty, sec. 94-3566.

Divorce decrees certified to state registrar, sec. 69-4433.

Collateral References

Divorce 1.

27A C.J.S. Divorce § 7.

21-102. (5735) Effect of divorce. The effect of a judgment of divorce is to restore the parties to the state of unmarried persons.

History: En. Sec. 131, Civ. C. 1895; re-en. Sec. 3642, Rev. C. 1907; re-en. Sec. 5735, R. C. M. 1921. Cal. Civ. C. Sec. 91.

Assertion of Dower

A decree of divorce, absolute on its face and duly entered by a court of competent jurisdiction, bars the subsequent assertion of dower. O'Malley v. O'Malley, 46 M 549, 556, 129 P 501.

Restoration of Parties to Unmarried State

A divorce judgment, appealed from, becomes final in such sense as to restore parties to state of unmarried persons under this section, only on determination of appeal in respondent's favor, and appeal suspends judgment until it is held

Restitution of property conveyed in consideration of previous reconciliation, as condition of entertaining divorce action. 4 ALR 2d 1210.

Effect of dismissal or discontinuance of divorce action on previous orders. 11 ALR 2d 1407.

Right of attorney to continue divorce or separation suit against wishes of his client. 92 ALR 2d 1009.

valid on such determination. Judson v. Anderson, 118 M 106, 165 P 2d 198, 207.

Collateral References

24 Am. Jur. 2d 1000, Divorce and Separation, § 879.

Propriety and effect of provision in decree in divorce suit in respect of policy of insurance on life of husband. 145 ALR 522.

Death of party to divorce suit after final divorce decree but pending appeal or

period allowed for appeal. 148 ALR 1111. Domestic decree of divorce based upon a finding of invalidity of a previous divorce in another state, as estopping party to the domestic suit to assert, in a subsequent litigation, the validity of the divorce decree in the other state. 150 ALR 465.

21-103. (5736) Causes for divorce. Absolute divorces, or separations from bed and board, or decrees for separate maintenance, may be granted for any of the following causes:

- 1. Incurable insanity:
- 2. Adultery:
- 3. Extreme cruelty:
- 4. Willful desertion:
- 5. Willful neglect;
- 6. Habitual intemperance;
- Conviction of felony.

History: Earlier acts concerning divorce; Sections 1 to 5, pp. 430 and 431, Bannack Statutes; re-enacted as sections 1 to 5, pp. 457 and 458, Codified Statutes 1871; re-enacted as sections 507 to 511, Fifth Division Revised Statutes 1879; re-

enacted as sections 999 to 1003. Fifth Division Compiled Statutes 1887.

This section En. Sec. 132, Civ. C. 1895; amd. Sec. 1, Ch. 118, L. 1907; re-en. Sec. 3643, Rev. C. 1907; re-en. Sec. 5736, R. C. M. 1921; amd. Sec. 1, Ch. 65, L. 1937;

amd. Sec. 1, Ch. 185, L. 1945. Cal. Civ. C. Sec. 92.

Cross-Reference

Confession of adultery does not justify divorce, sec. 93-2201-6.

Agreement for Divorce Void—Property Settlement Binding

While an agreement between husband and wife making a property settlement and providing for separation and divorce is void on the ground of public policy, equity will, in a subsequent suit for divorce by husband, hold the agreement separable and will not permit him to profit by its provisions and avoid its objectionable parts by invoking the rule, but will hold the part relating to divorce void, and the part referring to property settlement binding upon both parties. Herrin v. Herrin, 103 M 469, 473, 63 P 2d 137.

Agreement on Property Settlement

An agreement as to a property settlement which was not collusive for the purpose of bringing about or facilitating a divorce would be enforced. Schulz v. Fox, 136 M 152, 345 P 2d 1045.

Divorce Granted in Other State

No public policy of the state of Montana is violated by recognizing a Nevada divorce granted on the same grounds as the same divorce could have been granted in Montana. In re Anderson's Estate, 121 M 515, 194 P 2d 621, 625.

Relief Granted

There is no authority in the Montana Civil Code whereby the courts, by statute, could grant a divorce where only separate maintenance is sought. Reed v. Reed, 130 M 409, 304 P 2d 590, 592. (Dissenting opinions, 130 M 409, 304 P 2d 590, 593, 605.)

Where wife files complaint seeking separate maintenance, and husband files cross-complaint seeking an absolute divorce but court finds against husband, the court cannot, in finding for the wife, decree an absolute divorce in her favor, since the court may not grant any relief beyond that which is sought for by the prevailing party. Reed v. Reed, 130 M 409, 304 P 2d 590, 592. (Dissenting opinions, 130 M 409, 304 P 2d 590, 593, 605.)

Willful Neglect

Where complaint alleged that defendant, since September 3rd, 1944, neglected plaintiff and suit was filed August 18, 1945, the complaint was insufficient to charge willful neglect within the statute. Shaw v. Shaw, 122 M 593, 208 P 2d 514, 520.

References

Bordeaux v. Bordeaux, 30 M 36, 42, 75 P 524; Decker v. Decker, 56 M 338, 185 P 168; State ex rel. La Point v. District Court, 69 M 29, 31, 220 P 88; Giebler v. Giebler, 69 M 347, 350, 222 P 436; Clem v. Clem, 97 M 570, 575, 36 P 2d 1034; Carboni v. Carboni, 99 M 279, 43 P 2d 634.

Collateral References

Divorce 22 et seq.; Husband and Wife 2851/4.

27A C.J.S. Divorce § 14 et seq.; 42 C.J.S. Husband and Wife § 614.

24 Am. Jur. 2d 192, Divorce and Separation, § 18.

Collusion as bar to divorce. 2 ALR 699 and 109 ALR 832.

Desertion as affected by remonstrance or resistance. 3 ALR 503.

Forcing spouse to get rid of child by former marriage as cruelty. 3 ALR 803.

Abuse by relatives of other spouse as cruelty constituting grounds for divorce. 3 ALR 993 and 14 ALR 707.

Communication of venereal disease as cruelty. 5 ALR 1016 and 8 ALR 1540.

Offer, after lapse of statutory period of desertion, to resume marital relations. 18 ALR 630.

Single act as basis of divorce or separation on ground of cruelty. 24 ALR 918.

Divorce for desertion predicated upon conduct subsequent to a decree of separation. 25 ALR 1047 and 61 ALR 1268.

Adultery by deserted spouse after desertion as ground of divorce in favor of other spouse. 25 ALR 1051.

Refusal of one spouse to live with relatives of other as affecting desertion as ground of divorce or separation. 38 ALR 338 and 47 ALR 687.

Charges in divorce suit of marital misconduct as cruelty within statute defining grounds of divorce. 51 ALR 1188.

Necessity of continuance of drunkenness until commencement of suit or later. 54 ALR 331.

Discretion as to denial of divorce or separation where statutory grounds are established. 74 ALR 271.

Insanity as substantive ground of divorce or separation. 113 ALR 1248 and 24 ALR 2d 873.

What amounts to habitual intemperance, drunkenness, etc., within statute relating to substantive grounds for divorce. 120 ALR 1176 and 24 ALR 2d 1008.

Cruelty predicated upon acts or conduct during separation as ground for divorce or separation. 129 ALR 160.

Death of party to divorce suit after final divorce decree but pending appeal or period allowed for appeal. 148 ALR 1111. "Recrimination" as available defense in suit for divorce based on separation for

specified period. 152 ALR 336.

Individual acts of cohabitation between husband and wife as breaking continuity of abandonment, desertion, or separation, or as condonation thereof. 155 ALR 132.

Association or conduct of spouse with persons of opposite sex as cruelty or abusive treatment justifying divorce or separation. 157 ALR 631.

Conduct of plaintiff in divorce suit, not of itself a cause for divorce, as basis of defense of recrimination. 159 ALR 1453.

Divorce on ground of husband's gifts of his property to third persons. 160 ALR

Avoidance of procreation of children as ground for divorce and separation. 4 ALR

Insanity as affecting right to divorce or separation on other grounds. 19 ALR 2d

Conviction in another jurisdiction as within statute making conviction of crime a ground of divorce. 19 ALR 2d 1047.

Racial, religious, or political differences as ground for divorce, separation, or annulment. 25 ALR 2d 928.

Wife's failure to follow husband to new domicil as constituting desertion or abandonment as ground for divorce. 29 ALR 2d 474.

Use of drugs as habitual intemperance within statute relating to substantive grounds for divorce. 29 ALR 2d 925.

Condonation of cruel treatment as defense to action for divorce or separation. 32 ALR 2d 107.

Charge of insanity or attempt to have spouse committed to mental institution as ground for divorce or judicial separation. 33 ALR 2d 1230.

What amounts to incompatibility or inability of parties to live together within statutes relating to substantive grounds for divorce. 58 ALR 2d 1218.

Concealed premarital unchastity or parenthood as ground of divorce. 64 ALR 2d

What constitutes impotency as ground for divorce. 65 ALR 2d 776.

Charging spouse with criminal mis-conduct as cruelty constituting ground for divorce. 72 ALR 2d 1197.

Drunkenness or habitual intemperance as constituting cruelty as a ground for divorce. 76 ALR 2d 419.

Homosexuality, sodomy, or bestiality as ground for divorce. 78 ALR 2d 807.

Mistreatment of child as ground for divorce. 82 ALR 2d 1361.

Threats or attempts to commit suicide as cruelty or indignity constituting ground for divorce. 86 ALR 2d 422.

Acts occurring after commencement of suit for divorce as ground for decree under original complaint. 98 ALR 2d 1264.

Construction of statute making bigamy or prior lawful subsisting marriage to third person a ground for divorce. 3 ALR 3d 1108.

(5736.1) Incurable insanity. Incurable insanity may be established on the testimony of competent physicians that such person is beyond medical and surgical remedy, providing, however, that no divorce shall be granted on the grounds of incurable insanity unless such insane person has been regularly confined in any state or private institution for the permanent care of insane persons for at least five years next preceding the commencement of the action for divorce. In prosecuting a divorce upon this ground, a copy of the complaint filed and summons issued in said action shall be served in such manner as the court may direct upon the nearest blood relative, if any, and guardian, if any, of any such insane person, and the superintendent of the institution in which he or she is confined. Such relative or guardian and superintendent of the institution and such insane person shall be entitled to appear and be heard upon any and all issues. The status of the parties as to the support and maintenance of such insane person shall not be altered in any way by the granting of the divorce. The general procedure for publication of service of summons shall be applicable under the terms of this act.

History: En. Sec. 2, Ch. 65, L. 1937; amd. Sec. 2, Ch. 185, L. 1945.

Collateral References

Divorce 23, 128; Husband and Wife 285½, 297.

27A C.J.S. Divorce §§ 20, 49, 135; 42 C. J.S. Husband and Wife §§ 614, 621. 24 Am. Jur. 2d 245, Divorce and Sepa-

ration, § 84.

Insanity as substantive ground of divorce or separation, 113 ALR 1248 and 24 ALR 2d 873.

Requisites of proof of insanity as ground for divorce, 15 ALR 2d 1135.

Insanity as affecting right to divorce or separation on other grounds. 19 ALR 2d 144.

Charge of insanity or attempt to have spouse committed to mental institution as ground for divorce or judicial separation. 33 ALR 2d 1230.

21-105. (5737) Adultery defined. Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife.

History: En. Sec. 133, Civ. C. 1895; re-en. Sec. 3644, Rev. C. 1907; re-en. Sec. 5737, R. C. M. 1921. Cal. Civ. C. Sec. 93.

24 Am. Jur. 2d 198, Divorce and Separation, § 24.

Collateral References
Divorce©=26.
27A C.J.S. Divorce § 21.

Cohabitation under marriage contracted after divorce decree as adultery, where decree is later reversed or set aside. 63 ALR 2d 816.

21-106. (5738) Extreme cruelty defined. Extreme cruelty is any one of the following acts:

- (1) The infliction or threat of infliction of grievous bodily injury or of bodily injury dangerous to life; or
- (2) The repeated infliction or threat of bodily injury or personal violence upon the other party by one party to the marriage; or
- (3) The repeated publication or utterance of false charges against the chastity of the wife by the husband; or
- (4) The infliction of grievous mental suffering upon the other by one party to the marriage, by a course of conduct towards or treatment of one party to the marriage by the other, existing and persisted in for a period of one (1) year before the commencement of the action for divorce, which justly and reasonably is of such a nature and character as to destroy the peace of mind and happiness of the injured party, or entirely to defeat the proper and legitimate objects of marriage, or to render the continuance of the married relation between the parties perpetually unreasonable or intolerable to the injured party. The complainant in such suit may state the grounds for divorce in the words of the statute, but either party may demand a bill of particulars as in other civil cases.

History: En. Sec. 134, Civ. C. 1895; reen. Sec. 2, Ch. 118, L. 1907; re-en. Sec. 3645, Rev. C. 1907; re-en. Sec. 5738, R. C. M. 1921; amd. Sec. 1, Ch. 22, L. 1931; amd. Sec. 1, Ch. 19, L. 1949; amd. Sec. 1, Ch. 169, L. 1953. Cal. Civ. C. Sec. 94.

Bodily Injury

Husband was entitled to divorce where wife had repeatedly inflicted and threatened bodily injury and personal violence upon him. Bell v. Bell, 133 M 572, 328 P 2d 115, 119.

. Complaint

A complaint for divorce on ground of extreme cruelty must disclose the facts upon which the conclusion can be drawn by the court that defendant by a course of conduct toward or treatment of plaintiff is guilty of the character or degree of extreme cruelty that is defined in the

statute. Crenshaw v. Crenshaw, 120 M 190, 182 P 2d 477, 485.

Complaint-Insufficiency

A complaint in an action for divorce upon the ground of extreme cruelty, in that defendant struck, beat, and choked plaintiff and otherwise brutally treated her, but which omitted to allege that the acts of defendant produced grievous bodily injury or bodily injury dangerous to life, failed to state a cause of action. Ryan v. Ryan, 33 M 406, 409, 84 P 494, distinguished in 94 M 314, 318, 22 P 2d 306.

Complaint-Sufficiency

A complaint in an action for divorce drawn under the clause of this section, defining "extreme cruelty" as the infliction of grievous mental suffering caused by conduct of the defendant therein described, is sufficient if the acts of cruelty

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destroy the peace of mind and happiness of the plaintiff. Bickford v. Bickford, 94

M 314, 317, 22 P 2d 306.

Complaint alleging that defendant wife left home of plaintiff without his consent and remained away for many months at a time; that defendant was sullen and sulky, refusing to converse with plaintiff except to find fault with and nag him, refused to prepare his breakfast and seldom prepared his supper, refused to go out with him and continuously complained of being mistreated by him without cause, was sufficient to charge cruelty under this section. Kerrigan v. Kerrigan, 115 M 136, 142, 139 P 2d 523.

Complaint charging that the wife's course of conduct persisted for a period of more than one year before the commencement of the action and ever since their marriage was not insufficient in failing to allege that the acts of cruelty occurred within one year immediately pre-ceding the commencement of the action, and was sufficient as against a general demurrer to meet the requirement of this section. Kerrigan v. Kerrigan, 115 M 136,

142, 139 P 2d 533.

Continuous Nagging

Continuous nagging of one spouse by the other may constitute extreme cruelty for the infliction of which an action for divorce lies under this section. Putnam v. Putnam, 86 M 135, 139, 282 P 855.

Cross Complaint—Sufficiency

In an action for divorce by the husband, cross complaint of the wife charging that the children of plaintiff by a former marriage showed great hostility to their father's remarriage, that plaintiff from time to time mentioned these complaints to her, etc., and that plaintiff had accused defendant of being a dope fiend and engaged in the sale of narcotics, was sufficient to charge mental cruelty, under this section. Detert v. Detert, 115 M 313, 319, 142 P 2d 215.

Desertion Due to Cruelty

This section and section 21-108, providing that departure or absence of one spouse from the family dwelling because of cruelty on the part of the other, shall constitute desertion by such other are in pari materia and must be construed to-gether; therefore the contention of de-fendant wife charged with desertion because of infliction of cruelty upon the husband by reason of which he was compelled to leave the family home, that the cruelty mentioned in section 21-108, means the infliction of personal violence and not the cruelty as defined by this section, to wit, the infliction of grievous mental suffering, may not be sustained; in either event

the guilty party is the deserter. Putnam v. Putnam, 86 M 135, 139, 282 P 855.

Evidence Held Insufficient To Establish Extreme Cruelty

Evidence that defendant called plaintiff a liar, refused to sleep with him and refused to convey her dower rights in an oil lease was insufficient to establish wife's extreme cruelty entitling husband to divorce under this section. Judson v. Anderson, 118 M 106, 165 P 2d 198, 199.

A wife, refusing to join husband in execution of deeds to his real estate in which wife has interest under statute, is not guilty of marital offense entitling husband to divorce. Judson v. Anderson, 118

M 106, 165 P 2d 198, 199.

Evidence of two little flare-ups was insufficient to sustain granting of divorce on grounds of grievous mental suffering under this section. Crenshaw v. Crenshaw, 120 M 190, 182 P 2d 477, 488, 489, 490.

Extreme Cruelty Not Definable

The term "extreme cruelty" for which, under this section, a divorce may be granted is incapable of inclusive and ex-clusive definition, and whether an offending spouse has been guilty of such cruelty is solely a question of fact determinable from all the testimony presented. Williams v. Williams, 85 M 446, 449, 278 P 1009.

False Accusations

Unfounded accusations of misconduct may constitute cruelty. Hennity v. Hennity, 137 M 403, 352 P 2d 689, 692.

Guilt Depends Not upon Acts Charged. but upon Reaction upon Complainant

Whether defendant wife was guilty of extreme cruelty as defined in this section, was a question of fact to be determined from all the testimony presented; the par-ticular acts of cruelty complained of not being in themselves determining factors, the question rather being whether such acts were of such a nature and character as to destroy the peace of mind and happiness of the complaining husband. Kerrigan v. Kerrigan, 115 M 136, 143, 139 P 2d 533.

Harassing Actions

The maintenance by the wife of the accusations of misconduct, determined to be unproved, and the maintenance of a separate maintenance suit, with no offer of reconciliation, along with the other acts of cruelty proved to have existed, was conduct of such a nature as "to defeat the proper and legitimate objects of marriage" and "to render the continuance of the married relations between the parties perpetually unreasonable or intolerable" within the meaning of this section, and which were persisted in for one year preceding the commencement of the action. Hennity v. Hennity, 137 M 403, 352 P 2d 689, 691, 692.

Incompatibility Not Ground for Divorce in Montana

The burden was upon plaintiff of showing that the husband, charged with extreme cruelty, was guilty of acts condemned by this section defining it, but where the evidence shows little more than incompatibility (not made a ground for divorce in Montana), and not resulting in ill effects on the health of the wife, the evidence is insufficient to warrant her a decree of divorce. The marital disturbances in the case at bar under the facts presented, were caused chiefly by disparity of ages, the wife desiring they attend social gatherings of persons her age, twenty years younger than her husband. Argenbright v. Argenbright, 110 M 379, 382, 101 P 2d 62.

No Inclusive and Exclusive Definition of Legal Cruelty

Where extreme cruelty is charged in a divorce proceeding, each case must be determined upon its own peculiar facts; the courts have not attempted to make an inclusive and exclusive definition of legal cruelty; the particular acts of cruelty of which complaint is made are not in themselves determining factors, and whether defendant has been guilty of such cruelty as defined by this section is purely a question of fact to be determined from all the testimony presented. Wolz v. Wolz, 110 M 458, 460, 102 P 2d 22.

One Act of Injury

One act of bodily injury suffered less than a year before the commencement of the action does not constitute grounds for divorce. Shaw v. Shaw, 122 M 593, 208 P 2d 514, 520.

Pleading and Proof

Grievous bodily injury or bodily injury dangerous to life are ultimate facts which must be pleaded and proved in order to entitle plaintiff to a divorce on the ground of extreme cruelty. Ryan v. Ryan, 33 M 406, 409, 84 P 494, distinguished in 94 M 314, 318, 22 P 2d 306.

A complaint for divorce on ground of grievous mental suffering must allege, and evidence must show, the conduct toward or treatment of the injured spouse to have been existing and persisted in for a period of one year before commencement of action. Crenshaw v. Crenshaw, 120 M 190, 182 P 2d 477, 485.

A pleading which attempted to charge husband with extreme cruelty in language of the statute defining extreme cruelty as a ground for divorce and also by indefinite general charges and conclusions, was insufficient. Crenshaw v. Crenshaw, 120 M 190, 182 P 2d 477, 485.

Plaintiff must plead and prove that ex-

Plaintiff must plead and prove that extreme cruelty relied on as ground for divorce was existing and persisted in before action was filed. Crenshaw v. Crenshaw, 120 M 190, 182 P 2d 477, 485.

Provocation

Trial judge must determine whether sufficient provocation exists to provoke wife into violent action against husband. Bell v. Bell, 133 M 572, 328 P 2d 115, 120.

Statutory Time for Existence of Cruelty

Where the act of defendant wife, upon which the alleged cruelty was based (placing deeds to his property on record, given her on the condition that they be not recorded until his death) was done in November, 1940, and not brought to his knowledge until June, 1941, and the suit not brought until January 7, 1942, it can hardly be thought to have immediately started the course of mental cruelty and suffering contemplated by this section, nor that the evidence establishes mental cruelty within the requirement in Argenbright v. Argenbright, 110 M 379, 101 P 2d 62, and it is clear that plaintiff is not contitled to a divorce. Detert v. Detert, 115 M 313, 318, 142 P 2d 215.

What Are Determining Factors

The particular acts of cruelty of which complaint is made in a divorce proceeding are not in themselves determining factors in deciding whether a divorce on the ground of extreme cruelty shall be granted, but the question is whether the acts of cruelty are of such a nature and character as to destroy the peace of mind and happiness of the injured party. Williams v. Williams, 85 M 446, 449, 278 P 1009.

While this section, defining extreme cruelty for which an action for divorce lies, does not in terms provide that repeated false and malicious accusations by the wife charging the husband with marital infidelity shall constitute cruelty on her part, such accusations may inflict grievous mental suffering so as to destroy the peace of mind and happiness of the husband and to render the continuance of the marriage relation between the parties perpetually unreasonable and intolerable to him and, therefore, justify divorce under this section. Putnam v. Putnam, 86 M 135, 139, 282 P 855.

References

Giebler v. Giebler, 69 M 347, 350, 222 P 436; Poague v. Poague, 87 M 433, 434, 21-107 DIVORCE

288 P 454; Baird v. Baird, 125 M 122, 232 P 2d 348, 356; Reed v. Reed, 130 M 409, 304 P 2d 590, 593, 595 (dissenting opinion).

Collateral References

Divorce 27. 27A C.J.S. Divorce § 24 et seq. 24 Am. Jur. 2d 203, Divorce and Separation, § 32.

Forcing spouse to get rid of child by former marriage as cruelty. 3 ALR 803.

Abuse by relatives of other spouse as cruelty constituting grounds for divorce. 3 ALR 993.

Communication of venereal disease as cruelty. 5 ALR 1016 and 8 ALR 1540.

Single act as basis of divorce or separation on ground of cruelty. 24 ALR 918.

Charges in divorce suit of marital misconduct as cruelty within statute defining grounds of divorce. 51 ALR 1188.

Cruelty predicated upon acts or conduct during separation as ground for divorce or separation, 129 ALR 160.

Avoidance of procreation of children as ground for divorce and separation. 4 ALR

Revival of condoned cruelty or indignities for purpose of divorce or separation. 22 ALR 2d 155.

21-107. (5739) Desertion, what constitutes. Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert.

History: En. Sec. 135, Civ. C. 1895; re-en. Sec. 3646, Rev. C. 1907; re-en. Sec. 5739, R. C. M. 1921. Cal. Civ. C. Sec. 95.

Alimony

Where the husband is granted a divorce for the wife's willful desertion, the court has no authority, under section 21-139, to allow the wife permanent alimony. Albrecht v. Albrecht, 83 M 37, 39, 269 P 158.

Allegations in Complaint

In complaint for divorce on grounds of desertion, there must be affirmatively stated the cessation of cohabitation and the intent to desert and also that the desertion continues for one year as required by section 21-117. Hosking v. Hosking, 120 M 437, 186 P 2d 503, 504.

Where complaint alleged that defendant, since September 3rd, 1944, neglected plaintiff and suit was filed August 18, 1945, the complaint was insufficient to charge willful neglect within the statute. Shaw v. Shaw, 122 M 593, 208 P 2d 514, 520.

Allowance of Attorney Fees to Wife

While under the provision of section 21-137, the district court has discretionary power in a divorce action to compel the husband, during the pendency of the action, upon a proper showing by the wife, to provide the means to enable her to prosecute or defend the action, its power in this regard as to allowance of counsel fees is limited to the time when the action is pending, subject to the exception that allowance for past services may be made upon a showing of its necessity in order to enable her to continue her prosecution or defense. Albrecht v. Albrecht, 83 M 37, 39, 269 P 158.

Delay in Bringing Action

Where a delay of several years in bring-

ing an action for divorce against a wife, on the grounds of willful desertion, extreme cruelty and habitual drunkenness, was caused by plaintiff's desire to support defendant during a period of two and one-half years deemed necessary to effect a cure of a venereal disease with which she was afflicted, it was not so "unreasonable" within the meaning of section 21-130, as to warrant dismissal of the action because of laches. Ward v. Ward, 81 M 587, 601, 264 P 667.

When Separation Is a Bar

The definition of willful desertion implies that the separation is without justification. Where wife drank heavily, was away from home at night, visited houses of ill-fame and committed adultery, husband could leave without being guilty of willful desertion. Farwell v. Farwell, 47 M 574, 581, 133 P 958.

While desertion may be cured before the expiration of the period which will make it a ground for divorce, by the return of the erring party soliciting condonation, where the wife was guilty of desertion by causing the husband to depart from the home because of cruelty on her part and threats of bodily harm and she made no advances for reconciliation, a consequent separation was not a voluntary one, such as thereafter to bar action for divorce on that ground. Ward v. Ward, 81 M 587, 601, 264 P 667.

References

Decker v. Decker, 56 M 338, 344, 185 P 168; Putnam v. Putnam, 86 M 135, 141, 282 P 855; Clem v. Clem, 97 M 570 575, 36 P 2d 1034.

Collateral References

Divorce \$37. 27A C.J.S. Divorce § 35.

24 Am. Jur. 2d 257, Divorce and Separation, § 96.

Desertion as affected by remonstrance or resistance, 3 ALR 503.

Divorce for desertion predicated upon conduct subsequent to a decree of separation. 25 ALR 1047 and 61 ALR 1268.

Refusal of one spouse to live with relatives of other as affecting desertion as ground of divorce or separation. 38 ALR 388 and 111 ALR 697.

Denial of sexual intercourse because of religious convictions as abandonment or desertion sufficient for divorce or separation. 25 ALR 2d 936.

Wife's failure to follow husband to new domicil as constituting desertion or abandonment as ground for divorce. 29 ALR

21-108. (5740) Who commits desertion. Departure or absence of one party from the family dwelling place, caused by cruelty or threats of bodily harm from which danger would be reasonably apprehended from the other. is not desertion by the absent party, but it is desertion by the other party.

History: En. Sec. 136, Civ. C. 1895; re-en. Sec. 3647, Rev. C. 1907; re-en. Sec. 5740, R. C. M. 1921. Cal. Civ. C. Sec. 98.

Involuntary Separation

While desertion may be cured before the expiration of the period which will make it a ground for divorce, by the return of the erring party soliciting condo-nation, where the wife was guilty of de-sertion by causing the husband to depart from the home because of cruelty on her part and threats of bodily harm and she made no advances for reconciliation, a consequent separation was not a voluntary one, such as thereafter to bar action for divorce on that ground. Ward v. Ward, 81 M 587, 601, 264 P 667.

Section 21-106, and this section, providing that departure or absence of one spouse from the family dwelling because of cruelty on the part of the other, shall constitute desertion by such other are in pari materia and must be construed together; therefore the contention of defend-

ant wife charged with desertion because of infliction of cruelty upon the husband by reason of which he was compelled to leave the family home, that the cruelty mentioned in this section means the infliction of personal violence and not the cruelty as defined by section 21-106, the infliction of grievous mental suffering, could not be sustained; in either event, the guilty party was the deserter. Putnam v. Putnam, 86 M 135, 141, 282 P 855.

References

Decker v. Decker, 56 M 338, 344, 185 P 168; Boggs v. Boggs, 119 M 540, 177 P 2d 869, 871.

Collateral References

Collateral References Divorce 37 (16), (17). 27A C.J.S. Divorce § 36.

Divorce 37 (15), (16), (22). 27A C.J.S. Divorce §§ 35, 36.

Divorce: Acts or omissions of spouse causing other spouse to leave home as desertion by former. 19 ALR 2d 1428.

21-109. (5741) Separation by consent not desertion. Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion.

History: En. Sec. 137, Civ. C. 1895; re-en. Sec. 3648, Rev. C. 1907; re-en. Sec. 5741, R. C. M. 1921. Cal. Civ. C. Sec. 99.

Agreement of Separation

Where an agreement of separation between husband and wife did not contain a covenant, express or implied, not to sue for divorce for past offenses, the existence of the agreement is not a bar to such an action. Ward v. Ward, 81 M 587, 601, 264 P 667.

References

Clem v. Clem, 97 M 570, 575, 36 P 2d 1034.

fected by provision for post-mortem payment or performance. 1 ALR 2d 1264.

2d 954.

ration, § 112. Validity of separation agreement as af-

24 Am. Jur. 2d 273, Divorce and Sepa-

Written separation agreement as bar to divorce on ground of desertion. 34 ALR

21-110. (5742) Separation and intent. Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation.

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History: En. Sec. 138, Civ. C. 1895; re-en. Sec. 3649, Rev. C. 1907; re-en. Sec. 5742, R. C. M. 1921, Cal. Civ. C. Sec. 100.

Collateral References Divorce@37 (19). 27A C.J.S. Divorce § 39.

21-111. (5743) Consent to separation revocable. Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion.

History: En. Sec. 139, Civ. C. 1895; re-en. Sec. 3650, Rev. C. 1907; re-en. Sec. 5743, R. C. M. 1921. Cal. Civ. C. Sec. 101.

Effect of Action for Divorce on Separation

In case of separation by consent, consent is not revoked by the fact that the husband fails to support his wife, when she does not complain, nor because he attempts to secure a divorce, where she is trying to do the same thing. Bordeaux v. Bordeaux, 43 M 102, 116, 115 P 25.

Effect of Conditional Offer of Reconciliation

While an offer of reconciliation, in order to be classed as one made in good faith, must be free from improper qualifications and conditions, one made by the husband coupled with the condition that the wife give up her attachment for one of her roomers may not be said to have been burdened with an improper condition. Giebler v. Giebler, 69 M 347, 350, 222 P 436.

Effect of Separation on Marital Status

A separation agreement does not change the legal status of husband and wife; they are still such, subject to certain duties and obligations which the law imposes upon the parties. Giebler v. Giebler, 69 M 347, 350, 222 P 436.

Offer of Reconciliation-Pleading

In pleading, whatever is necessarily implied in or reasonably to be inferred from an allegation must be taken as directly averred; and under that rule, an allegation in the cross-complaint of the wife that plaintiff husband had refused to maintain further marital relations with defendant, was equivalent to averring an offer to return, i. e., that she had sought reconciliation, which was refused, refusal in such circumstances constituting desertion on the part of the husband. Clem v. Clem, 97 M 570, 575, 36 P 2d 1034.

Refusal of Offer of Reconciliation Is Desertion

Where a separation has once been established by mutual agreement, express or implied, it will be presumed to continue until one of the parties revokes consent and in good faith seeks reconciliation and restoration; whereupon the party reject-

ing the overtures thus made is guilty of desertion. Bordeaux v. Bordeaux, 43 M 102, 110, 115 P 25.

The theory of this section is that, where both parties have consented, neither can allege that the act of the other is wrongful, until consent has been revoked, though each may at the time of the separation have intended to abandon the other. Bordeaux v. Bordeaux, 43 M 102, 110, 115 P 25.

Where the parties in an action for divorce on the ground of desertion had lived apart for some years, evidence showing that the separation had been by mutual consent, that an offer of reconciliation made by the plaintiff husband was made in good faith, and that defendant capriciously rejected it, was sufficient under this section to make out a case of desertion on the part of the wife, and to entitle plaintiff to the relief demanded. Bordeaux v. Bordeaux, 43 M 102, 118, 115 P

Where husband and wife were living apart under a separation agreement, an offer of reconciliation made by the husband was not open to the charge that it was not made in good faith in the absence of a showing that at the time it was made he had secured and furnished a home for himself and wife, the statute not imposing such a burden, and section 21-113, providing that it is the privilege of the husband to choose any reasonable place of abode or mode of living, and if the wife does not conform thereto it is desertion. Giebler v. Giebler, 69 M 347, 350, 222 P 436.

Where Revocation Ineffectual

Where a separation of husband and wife was made by mutual consent, alleged revocation of the agreement by the husband by means of a letter was of no avail as evidence of desertion on the part of the wife, the time elapsing between the writing of the letter and the commencement of his action for divorce having been insufficient. Herrin v. Herrin, 103 M 469, 474, 63 P 2d 137.

Collateral References

Divorce 37 (7), (16), (19). 27A C.J.S. Divorce §§ 36, 38.

Validity of separation agreement as affected by provision for post-mortem payment or performance. 1 ALR 2d 1264.

21-112. (5744) Desertion—how cured. If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured. If the other party refuse such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of refusal.

History: En. Sec. 140, Civ. C. 1895; re-en. Sec. 3651, Rev. C. 1907; re-en. Sec. 5744, R. C. M. 1921, Cal. Civ. C. Sec. 102.

Cruel Treatment

Wife seeking separate maintenance was not guilty of desertion where she was forced to leave defendant because of his cruel treatment and brutal acts. Reynolds v. Reynolds, 132 M 303, 317 P 2d 856, 859.

Effect of Return to Nurse Spouse During Illness

The fact that the wife returned to her husband for three days to nurse him during an illness will not cure the willful desertion in the absence of evidence to the effect that the wife returned with the intention to fulfill or resume the mar-

riage contract, or that she made an offer in good faith to fulfill the marriage contract or solicited condonation. Decotovich v. Decotovich, 125 M 56, 229 P 2d 971, 975.

References

Ward v. Ward, 81 M 587, 601, 264 P 667; Damm v. Damm, 82 M 239, 247, 266 P 410; Goodwin v. Elm Orlu Min. Co., 83 M 152, 160, 269 P 403.

Collateral References

Divorce \$37 (8), (19). 27A C.J.S. Divorce § 38.

Offer, after lapse of statutory period of desertion, to resume marital relations. 18 ALR 630.

21-113. (5745) Husband may select home. The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion.

History: En. Sec. 141, Civ. C. 1895; re-en. Sec. 3652, Rev. C. 1907; re-en. Sec. 5745, R. C. M. 1921. Cal. Civ. C. Sec. 103.

Abandonment of Wife

The husband is ordinarily the head of the family, and has the right to select the home, but he loses such right where he abandons his wife. Mennell v. Wells, 51 M 141, 148, 149 P 954.

Offer of Reconciliation

Where husband and wife were living apart under a separation agreement, an offer of reconciliation made by the husband was not open to the charge that it was not made in good faith in the absence of a showing that at the time it was made he had secured and furnished a home for himself and wife, the statute not imposing such burden, and this section providing that it is the privilege of the husband to choose any reasonable place of abode or mode of living, and if the wife does not conform thereto it is desertion. Giebler v. Giebler, 69 M 347, 222 P 436.

Wife's Refusal To Return Home

Where a husband, having a home in this state, removed temporarily to a city in another state and on returning to his home in Montana with intention of remaining there, requested the wife to accompany him but met with the declaration

that she would never again go there, such refusal constituted desertion on her part, in the absence of proof that the home was not a fit place in which to live or that her refusal to return was the result of his inability to pay for her transportation. Damm v. Damm, 82 M 239, 247, 266 P 410.

A mere showing that parties are married may raise a presumption that the wife is legally entitled to be supported by the husband, but where the evidence showed that at the time the husband was injured in the course of his employment she was and had been for four years living apart from him and had refused to return to the home provided by him because he declined to receive as a member of the household her son by a former marriage who was capable of caring for himself, which the husband was not required to do under section 61-117, her refusal was unreasonable and constituted desertion on her part. Goodwin v. Elm Orlu Min. Co., 83 M 152, 160, 269 P 403.

References

Boggs v. Boggs, 119 M 540, 177 P 2d 869, 871.

Collateral References

Divorce 37 (21); Husband and Wife 3 (1).

27A C.J.S. Divorce § 36; 41 C.J.S. Husband and Wife § 10.

21-114. (5746) If place unfit, desertion on part of husband. If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him.

History: En. Sec. 142, Civ. C. 1895; re-en. Sec. 3653, Rev. C. 1907; re-en. Sec. 5746, R. C. M. 1921. Cal. Civ. C. Sec. 104.

Sufficiency of Complaint

Complaint in an action for separate maintenance was sufficient to state a cause

of action under this section. Decker v. Decker, 56 M 338, 185 P 168.

References

Goodwin v. Elm Orlu Min. Co., 83 M 152, 160, 269 P 403.

21-115. (5747) Willful neglect, what constitutes. Willful neglect is the neglect of the husband to provide for his wife the common necessaries of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy, or dissipation.

History: En. Sec. 143, Civ. C. 1895; re-en. Sec. 3654, Rev. C. 1907; re-en. Sec. 5747, R. C. M. 1921. Cal. Civ. C. Sec. 105.

References

Farwell v. Farwell, 47 M 574, 580, 133 P 958; State ex rel. La Point v. District

Court, 69 M 29, 31, 220 P 88; Murphy v. Murphy, 134 M 594, 335 P 2d 296, 297.

Collateral References

Divorce 32.

27A C.J.S. Divorce § 40.

24 Am. Jur. 2d 318, Divorce and Separation, § 160.

21-116. (5748) Habitual intemperance, what constitutes. Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business.

History: En. Sec. 144, Civ. C. 1895; re-en. Sec. 3655, Rev. C. 1907; re-en. Sec. 5748, R. C. M. 1921. Cal. Civ. C. Sec. 106.

Collateral References

Divorce[™]22.

27A C.J.S. Divorce § 48.

24 Am. Jur. 2d 250, Divorce and Separation, § 89.

Necessity of continuance of drunkenness until commencement of suit or later. 54 ALR 331.

What amounts to habitual intemperance, drunkenness, etc., within statute relating to substantive ground for divorce. 120 ALR 1176 and 29 ALR 2d 925.

21-117. (5749) Desertion, neglect or habitual intemperance for one year. Willful desertion, willful neglect, or habitual intemperance must continue for the space of one year before there is a ground for divorce.

History: En. Sec. 145, Civ. C. 1895; re-en. Sec. 3656, Rev. C. 1907; re-en. Sec. 5749, R. C. M. 1921, Cal. Civ. C. Sec. 107.

Application of Section

This section has no application to an action for separate maintenance on the ground of willful desertion. Decker v. Decker, 56 M 338, 185 P 168.

Burden of Proof

Desertion does not constitute a ground for divorce unless it has continued for one year (this section). The court in granting plaintiff husband a decree on that ground because of defendant's conduct causing him to leave the home on account of cruelty on her part, found that the evidence was just as strong that he left more than a year before the action was begun as that he left seven months later than the date alleged, as contended by defendant. According to the finding, the evidence was evenly balanced or in equilibrium on this vital issue; hence plaintiff did not sustain the burden of proof by a preponderance of the evidence, and decree in his favor was error. Putnam v. Putnam, 86 M 135, 141, 282 P 855.

Complaint

Complaint charging desertion must be sufficiently informative as to matter of time and place of desertion as to reason-

ably inform the defendant of the charge. Hosking v. Hosking, 120 M 437, 186 P 2d 503, 504.

In complaint for divorce on grounds of desertion, there must be affirmatively shown the cessation of cohabitation and the intent to desert as well as that the desertion continued for a period of one year. Hosking v. Hosking, 120 M 437, 186 P 2d 503, 504.

Where complaint alleged that defendant since September 3rd, 1944, neglected plaintiff and suit was filed August 18, 1945, the complaint was insufficient to charge

willful neglect within the statute. Shaw v. Shaw, 122 M 593, 208 P 2d 514, 520.

References

State ex rel. Cotter v. District Court, 49 M 146, 150, 140 P 732; Crenshaw v. Crenshaw, 120 M 190, 182 P 2d 477, 483; Murphy v. Murphy, 134 M 594, 335 P 2d 296, 297.

Collateral References

Divorce@=22, 32, 37 (5). 27A C.J.S. Divorce §§ 37, 40, 48.

21-118. (5750) Divorces denied, on showing what. Divorces must be denied upon showing:

- 1. Connivance:
- 2. Collusion:
- 3. Condonation;
- 4. Recrimination.

History: En. Sec. 160, Civ. C. 1895; reen. Sec. 3658, Rev. C. 1907; reen. Sec. 5750, R. C. M. 1921. Cal. Civ. C. Sec. 111.

Recrimination

The doctrine of recrimination is that if both parties have a right to divorce, neither party has. The principle is of ancient origin and reached back to the Mosaic Code and beyond. Although the Roman law did not allow divorce yet some legal historians trace the rule back to the "compensatio criminum" of the Roman law relating to property settlements. The ecclesiastical courts of England adopted the principle from the canon law and then injected it into proceedings for separation from bed and board. Bissell v. Bissell, 129 M 187, 284 P 2d 264, 270.

The doctrine of recrimination is not an

The doctrine of recrimination is not an absolute but a qualifying doctrine. If it were to be applied strictly great inequity would be done, for it so often happens that neither party to a suit has been free from fault. Bissell v. Bissell, 129 M 187, 284 P 2d 264, 271.

When the record clearly shows "the legitimate objects of the marriage have been destroyed" then the parties are entitled to have the marriage dissolved. No public policy would be served by denying a divorce because each party was guilty of extreme cruelty toward the other. Bissell v. Bissell, 129 M 187, 284 P 2d 264, 271, explained in 145 M 1, 7, 400 P 2d 642.

Doctrine of recrimination was inappli-

cable where court found that defendant husband was not guilty of the infliction of extreme cruelty upon the plaintiff wife, nor was he guilty of the infliction of grievous mental suffering upon the plaintiff. Bell v. Bell, 133 M 572, 328 P 2d 115, 120.

When trial court has found that both parties to a divorce action have established grounds for divorce and it further finds that the legitimate objects of marriage have been destroyed, it may, in its discretion, award divorce to both parties. Burns v. Burns, 145 M 1, 400 P 2d 642

References

Bordeaux v. Bordeaux, 30 M 36, 42, 75 P 524, 32 M 159, 165, 80 P 6; State ex rel. Cotter v. District Court, 49 M 146, 150, 140 P 732; Cooper v. Cooper, 92 M 57, 65, 10 P 2d 939; Deich v. Deich, 136 M 566, 323 P 2d 35, 45.

Collateral References

Divorce ≈ 38½, 45-56. 27A C.J.S. Divorce §§ 56, 59-67. 24 Am. Jur. 2d 348, Divorce and Separation, § 189 et seq.

Antenuptial knowledge relating to alleged grounds as barring right to divorce. 15 ALR 2d 670.

Recrimination as defense to divorce sought on ground of incompatibility. 21 ALR 2d 1267.

21-119. (5751) Connivance, what constitutes. Connivance is the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce.

History: En. Sec. 161, Civ. C. 1895; re-en. Sec. 3659, Rev. C. 1907; re-en. Sec. 5751, R. C. M. 1921. Cal. Civ. C. Sec. 112.

Desertion

Where in an action for divorce against the husband on the ground of cruelty the latter by cross complaint charged the wife with desertion, the fact that he during the wife's absence from his home before commencement of the action made regular monthly payments to her, as well as some after its commencement, for her support did not preclude him from contending that she was a deserter, nor amount to a "corrupt consent" to her acts of desertion within the meaning of this section, defining "connivance," which, under the section 21-118, bars divorce. Cooper v. Cooper, 92 M 57, 65, 10 P 2d 939.

Wife's Adultery

Connivance is little less than a crime generally, and may constitute a crime under certain circumstances. The fact that the plaintiff, suspecting his wife of adultery, laid a trap and caught her flagrante delicto, thereby securing evidence to be used by him in his divorce proceeding, is not sufficient to charge him with connivance so long as he was not in any respect responsible for her adulterous act. Farwell v. Farwell, 47 M 574, 578, 133 P 958.

Collateral References

Divorce \$45. 27A C.J.S. Divorce § 64.

24 Am. Jur. 2d 351, Divorce and Separation, § 193.

What amounts to connivance by one spouse at other's adultery. 17 ALR 2d 342.

21-120. (5752) Collusion, what constitutes. Collusion is an agreement between husband and wife that one of them shall commit, or appear to have committed, or to be falsely represented in court as having committed, acts constituting a cause of divorce for the purpose of enabling the other to obtain a divorce.

History: Earlier statutes relative to collusion were section 4, p. 430, Bannack Statutes; re-enacted as section 4, p. 458, Codified Statutes 1871; re-enacted as section 570, Fifth Division Revised Statutes 1879; re-enacted as section 1002, Fifth Division Compiled Statutes 1887.

This section en. Sec. 162, Civ. C. 1895; re-en. Sec. 3660, Rev. C. 1907; re-en. Sec. 5752, R. C. M. 1921. Cal. Civ. C. Sec. 114.

References

In re Huppe, 92 M 211, 218, 11 P 2d 793; Deich v. Deich, 136 M 566, 323 P 2d 35, 45.

Collateral References

Divorce €= 56.

27A C.J.S. Divorce § 65.

24 Am. Jur. 2d 348, Divorce and Separation, § 189.

Collusion as bar to divorce. 28 ALR 699.

21-121. (5753) Condonation, what constitutes. Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce.

History: En. Sec. 163, Civ. C. 1895; re-en. Sec. 3661, Rev. C. 1907; re-en. Sec. 5753, R. C. M. 1921. Cal. Civ. C. Sec. 115.

References

Bickford v. Bickford, 94 M 314, 319, 22 P 2d 306; Docotovich v. Docotovich, 125 M 56, 229 P 2d 971, 975.

Collateral References

Divorce 348.

27A C.J.S. Divorce § 59. 24 Am. Jur. 2d 359, Divorce and Separation, § 202.

Antenuptial knowledge relating to alleged grounds as barring right to divorce. 15 ALR 2d 670.

Condonation of cruel treatment as defense to action for divorce or separation. 32 ALR 2d 107.

- **21-122.** (5754) **Requisites to condonation.** The following requirements are necessary to condonation:
- 1. A knowledge on the part of the injured party of the facts constituting the cause of divorce.
 - 2. Reconciliation and remission of the offense by the injured party.
 - 3. Restoration of the offending party to all marital rights.

History: En. Sec. 164, Civ. C. 1895; re-en. Sec. 3662, Rev. C. 1907; re-en. Sec. 5754, R. C. M. 1921. Cal. Civ. C. Sec. 116.

Absence of Good Faith

Offers and solicitation of condonation were not made in good faith and did not bar plaintiff's action for separate maintenance where record showed that defendant was exploring the possibility of obtaining a church annulment of the marriage; there was an absence of good faith on his part in seeking condonation; and there was no evidence tending to show that plaintiff would be free of danger of

renewed cruelty were she to return and live with defendant. Reynolds v. Reynolds, 132 M 303, 317 P 2d 856, 858.

References

Bordeaux v. Bordeaux, 30 M 36, 43, 75 P 524; Docotovich v. Docotovich, 125 M 56, 229 P 2d 971, 975.

Collateral References

Divorce 49.

27A C.J.S. Divorce § 60 et seq. 24 Am. Jur. 2d 359, Divorce and Separation, § 202.

21-123. (5755) Condonation implies what. Condonation implies a condition subsequent, that the forgiving party must be treated with conjugal kindness

History: En. Sec. 165, Civ. C. 1895; re-en. Sec. 3663, Rev. C. 1907; re-en. Sec. 5755, R. C. M. 1921. Cal. Civ. C. Sec. 117.

References

Bickford v. Bickford, 94 M 314, 319, 22 P 2d 306; Docotovich v. Docotovich, 125 M 56, 229 P 2d 971, 975.

Collateral References

Divorce 50, 51. 27A C.J.S. Divorce §§ 59, 62.

Antenuptial knowledge relating to alleged grounds as barring right to divorce. 15 ALR 2d 670.

21-124. (5756) Evidence of condonation. Where the cause of divorce consists of a course of offensive conduct, or arises, in cases of cruelty, from successive acts of ill-treatment, which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone.

History: En. Sec. 166, Civ. C. 1895; reen. Sec. 3664, Rev. C. 1907; re-en. Sec. 5756, R. C. M. 1921. Cal. Civ. C. Sec. 118.

References

Bickford v. Bickford, 94 M 314, 319, 22 P 2d 306.

Separation Agreement

Where an agreement of separation between husband and wife did not contain a covenant, express or implied, not to sue for divorce for past offenses, the existence of the agreement is not a bar to such an action. Ward v. Ward, 81 M 587, 600, 264 P 667.

Collateral References

Divorce \$49, 135. 27A C.J.S. Divorce §§ 60 et seq., 144. 24 Am. Jur. 2d 361, Divorce and Separation, § 204.

21-125. (5757) When condonation can only be made. In cases mentioned in the last section, condonation can be made only after the cause of divorce has become complete, as to the acts complained of.

History: En. Sec. 167, Civ. C. 1895; re-en. Sec. 3665, Rev. C. 1907; re-en. Sec. 5757, R. C. M. 1921, Cal. Civ. C. Sec. 119. Collateral References
Divorce 49.
27A C.J.S. Divorce § 60 et seq.

21-126. (5758) Concealment of facts in certain cases makes condonation void. A fraudulent concealment by the offending party of facts constituting a different cause of divorce from the one condoned, and existing at the time of condonation, avoids such condonation.

History: En. Sec. 168, Civ. C. 1895; re-en. Sec. 3666, Rev. C. 1907; re-en. Sec. 5758, R. C. M. 1921. Cal. Civ. C. Sec. 120.

- 21-127. (5759) Condonation—how revoked. Condonation is revoked, and the original cause of divorce revived:
- 1. When the offending party commits acts constituting a like or other cause of divorce; or,
- 2. When the offending party is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled.

History: En. Sec. 169, Civ. C. 1895; re-en. Sec. 3667, Rev. C. 1907; re-en. Sec. 5759, R. C. M. 1921, Cal. Civ. C. Sec. 121.

Lack of Good Faith

Where, in an action for divorce, defendant wife interposed the defense of condonation and a resumption of marital relations, but the record disclosed much quarreling and other acts of conjugal unkindness thereafter, sufficient to show that the conditions of condonation were not accepted by her in good faith nor fulfilled,

it was revoked under this section, and the court did not err in admitting evidence of acts of cruelty committed prior to the date of the alleged condonation. Bickford v. Bickford, 94 M 314, 319, 22 P 2d 306.

Collateral References

Divorce \$51. 27A C.J.S. Divorce § 62.

Revival of condoned adultery. 16 ALR 2d 585.

21-128. (5760) Recrimination, what constitutes. Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.

History: En. Sec. 170, Civ. C. 1895; re-en. Sec. 3668, Rev. C. 1907; re-en. Sec. 5760, R. C. M. 1921. Cal. Civ. C. Sec. 122.

Construction and Application

The doctrine of recrimination is not an absolute but a qualifying doctrine. If it were to be applied strictly great inequity would be done, for it so often happens that neither party to a suit has been free from fault. Bissell v. Bissell, 129 M 187, 284 P 2d 264, 271.

The phrase, "in bar of the plaintiff's cause of divorce," is a recognition of the judicial principle that in divorce litigation

the fault of the plaintiff should have no more significance than elsewhere in the law. Burns v. Burns, 145 M 1, 400 P 2d 642.

References

Bordeaux v. Bordeaux, 30 M 36, 43, 75 P 524.

Collateral References

Divorce \$53-55. 27A C.J.S. Divorce § 67.

24 Am. Jur. 2d 381, Divorce and Separation, § 226.

- 21-129. (5761) Condonation in a recriminatory defense—when a bar to defense. When a cause of divorce is set up in the answer as a recriminatory defense, the condonation thereof is a bar to such defense unless:
 - 1. The condonation be revoked as provided in section 21-127; or,
- 2. Two years have elapsed after the condonation and before the accruing or completion of the cause of action alleged in the complaint.

History: En. Sec. 171, Civ. C. 1895; re-en. Sec. 3669, Rev. C. 1907; re-en. Sec. 5761, R. C. M. 1921. Cal. Civ. C. Sec. 123.

Collateral References
Divorce 54, 55.
27A C.J.S. Divorce § 67.

21-130. (5762) Divorce—when denied. A divorce must be denied:

- 1. When the cause is adultery, and the action is not commenced within two years after its discovery by the injured party; or,
- 2. When the cause is conviction of felony, and the action is not commenced before the expiration of two years after final judgment and sentence;

3. In all other cases where there is an unreasonable lapse of time before the commencement of the action.

History: En. Sec. 172, Civ. C. 1895; re-en. Sec. 3670, Rev. C. 1907; re-en. Sec. 5762, R. C. M. 1921. Cal. Civ. C. Sec. 124.

Conviction of Felony

Where the complaint in an action for divorce asked for on the ground that defendant had been convicted of a felony, showed that two years had elapsed since conviction, and, in the absence of any excuse for the delay in bringing suit, the court, notwithstanding defendant's default, properly denied the divorce on its own motion by virtue of the provisions of this section. Franklin v. Franklin, 40 M 348,

350, 352, 106 P 353.

The language of this section is no more imperative than is that of section 21-134. Both declare that "a divorce must be denied," in the one case if the action is not brought within two years after final judgment and sentence, and in the other if the plaintiff has not been a resident of the state for the required time. It would seem inconsistent to hold that in the latter case, on grounds of public policy, the fact must be alleged and proved, and that in the former it is a matter of no concern, except to the parties, when the action is brought. Franklin v. Franklin, 40 M 348, 350, 352, 106 P 353.

Unreasonable Lapse of Time

The "unreasonable lapse of time" in bringing an action for divorce on certain grounds, which under this section bars it, is such delay in commencing suit as establishes the presumption that there has been connivance, collusion or condonation of the offense, with intent to continue the marriage relation notwithstanding the offense, but such presumption may be rebutted by showing reasonable grounds for the delay. Ward v. Ward, 81 M 587, 602, 264 P 667.

Where a delay of several years in bringing an action for divorce against the wife, on the grounds of willful desertion, extreme cruelty and habitual drunkenness, was caused by plaintiff's desire to support defendant during a period of two and onehalf years deemed necessary to effect a cure of a venereal disease with which she was afflicted, it was not so "unreasonable" within the meaning of this section as to warrant dismissal of the action because of laches. Ward v. Ward, 81 M 587, 602, 264 P 667.

Collateral References

Divorce \$\infty 66\frac{1}{2}, 68. 27A C.J.S. Divorce, §§ 86, 88. 24 Am. Jur. 2d 490, Divorce and Separation, § 349.

21-131. (5763) Lapse of time establishes certain presumptions. Unreasonable lapse of time is such a delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation, notwithstanding the commission of such

History: En. Sec. 173, Civ. C. 1895; re-en. Sec. 3671, Rev. C. 1907; re-en. Sec. 5763, R. C. M. 1921. Cal. Civ. C. Sec. 125.

Collateral References

Divorce 661/2, 109. 27A C.J.S. Divorce §§ 87, 123.

References

Ward v. Ward, 81 M 587, 603, 264 P 667.

21-132. (5764) Presumptions may be rebutted. The presumptions arising from lapse of time may be rebutted by showing reasonable grounds for the delay in commencing the action.

History: En. Sec. 174, Civ. C. 1895; re-en. Sec. 3672, Rev. C. 1907; re-en. Sec. 5764, R. C. M. 1921. Cal. Civ. C. Sec. 126.

Collateral References

Divorce 109. 27A C.J.S. Divorce § 87.

References

Ward v. Ward, 81 M 587, 603, 264 P 667.

21-133. (5765) Limitation of time. There are no limitations of time for commencing actions for divorce, except such as are contained in section 21-130.

21-134 DIVORCE

History: En. Sec. 175, Civ. C. 1895; re-en. Sec. 3673, Rev. C. 1907; re-en. Sec. 5765, R. C. M. 1921. Cal. Civ. C. Sec. 127.

References

State ex rel. Cotter v. District Court,

49 M 146, 150, 140 P 732; Ward v. Ward, 81 M 587, 602, 264 P 667.

Collateral References

Divorce \$67. 27A C.J.S. Divorce \$88.

21-134. (5766) Period of residence required to entitle plaintiff to divorce. A divorce must not be granted unless the plaintiff has been a resident of the state for one year next preceding the commencement of the action.

History: En. Sec. 176, Civ. C. 1895; re-en. Sec. 3674, Rev. C. 1907; re-en. Sec. 5766, R. C. M. 1921. Cal. Civ. C. Sec. 128.

Allegation in Complaint

The fact that plaintiff in a suit for divorce has been a resident of the state for the statutory period of one year next preceding the commencement of the suit must be alleged in the complaint in order to confer jurisdiction of the cause upon the trial court. Rumping v. Rumping, 36 M 39, 40, 91 P 1057; Eadie v. Eadie, 44 M 391, 394, 120 P 239. See Franklin v. Franklin, 40 M 348, 351, 106 P 353. See also Clark v. Clark, 64 M 386, 392, 210 P 93; Cooper v. Cooper, 92 M 57, 10 P 2d 939.

"Citizenship" and "Residence" Not Convertible Terms

"Citizenship" and "residence" are not convertible terms; citizenship implies much more than residence and carries the idea of connection or identification with the state and participation in its functions; it applies to a person possessing social and political rights, and sustaining social, political and moral obligations; an allegation of residence in a state does not mean citizenship therein. One not a citizen of the United States may become a resident within the meaning of the divorce statutes, and may invoke the jurisdiction of the state courts in a divorce proceeding. State ex rel. Duckworth v. District Court, 107 M 97, 101, 80 P 2d 367.

Construction of Section

The language of this section is imperative. Franklin v. Franklin, 40 M 348, 352, 106 P 353.

Inquiry by District Court

In divorce proceedings district courts should, under the mandate of this section, ex officio inquire into the fact of plaintiff's residence—jurisdictional in its nature—and be governed accordingly. Rumping v. Rumping, 36 M 39, 43, 91 P 1057. See Franklin v. Franklin, 40 M 348, 351, 106 P 353.

Residence Is Changed by Removal Joined with Intent

Where both plaintiff and defendant removed to California but returned to Montana some four or five years later, and testified that they never intended to abandon their legal residence in Montana, trial court's finding that their removal was with the intention of making permanent residence in California was error. Herrin v. Herrin, 103 M 469, 472, 63 P 2d 137.

"Residence" Synonymous with "Domicile"

Where statutes refer only to residence and not to domicile, as does this section, the courts have generally held that the word "residence" will be construed to mean practically the same as "domicile." The legislature in enacting section 83-303, and defining the term "residence" has adopted the same rule. State ex rel. Duckworth v. District Court, 107 M 97, 101, 80 P 2d 367.

The "domicile" of a person within the rule that courts have generally held the word "residence" to mean practically the same as "domicile" under laws referring only to residence and not to domicile as does this section, is one's voluntarily fixed habitation, not for a mere temporary or special purpose, but with a present intention of making it his home until something uncertain and unexpected happens to induce him to adopt some other permanent home; place of lodging being a weightier criterion of domicile than the place of business. State ex rel. Duckworth v. District Court, 107 M 97, 101, 80 P 2d 367.

Where Citizen of Canada Entitled To Maintain Suit

Where plaintiff in a divorce action was a citizen of the Dominion of Canada and employed in its customs service on the boundary line between the United States and Canada at a place where there were no living quarters, necessitating his seeking quarters in a nearby Montana town to which he returned each night, he was a resident of this state within the meaning of the divorce statute. State ex rel. Duck-

worth v. District Court, 107 M 97, 102, 80 P 2d 367.

References

In re Anderson's Estate, 121 M 515, 194 P 2d 621, 622; Mortenson v. Mortenson, 129 M 290, 285 P 2d 834, 836; Reed v. Reed, 130 M 409, 304 P 2d 590, 593, 595 (dissenting opinion).

Collateral References

Divorce© 62, 64.

27A C.J.S. Divorce § 75.

24 Am. Jur. 2d 401, Divorce and Separation, § 246.

Separate domicil of wife for purposes of jurisdiction over suit by her for divorce or separation. 39 ALR 710.

Jurisdiction of courts of state of which neither party is a resident over suit between husband and wife for alimony or division of property rights without divorce. 74 ALR 1242.

Nonresidence of defendant or cross complainant in a suit for divorce as affecting power to grant divorce in his or her favor. 89 ALR 1203.

What constitutes residence or domicil within state for purpose of jurisdiction in divorce. 106 ALR 6 and 159 ALR 496.

Recognition as to marital status of foreign divorce decree attacked on ground of lack of domicil, since Williams decision. 1 ALR 2d 1385 and 28 ALR 2d 1303.

Length or duration of domicil, as distinguished from fact of domicil at commencement of action for divorce, as a jurisdictional matter. 2 ALR 2d 291.

Change of residence by plaintiff, pendente lite, as affecting jurisdiction of court to grant divorce. 7 ALR 2d 1414.

Residence or domicil, for purpose of di-

Residence or domicil, for purpose of divorce action, of one in armed forces. 21 ALR 2d 1163.

Nature and location of one's business or calling as element in determining domicil in divorce cases, 36 ALR 2d 756,

Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting matrimonial actions. 54 ALR 2d 390.

21-135. (5767) Divorce not granted by default alone, etc. No divorce can be granted upon the default of the defendant alone, but the cause must be heard in open court, and the court must require proof of all the facts alleged.

History: En. Sec. 177, Civ. C. 1895; re-en. Sec. 3675, Rev. C. 1907; re-en. Sec. 5767, R. C. M. 1921. Cal. Civ. C. Sec. 130.

References

State ex rel. Cotter v. District Court, 49 M 146, 150, 140 P 732; Clark v. Clark, 64 M 386, 393, 210 P 93; Reed v. Reed, 130 M 409, 304 P 2d 590, 593, 600 (dissenting opinion).

Collateral References

Divorce 109, 146, 160. 27A C.J.S. Divorce §§ 123, 148, 164.

Power of court, in absence of express authority, to grant relief from judgment by default in divorce action. 22 ALR 2d 1312.

Reconciliation as affecting separation decree. 35 ALR 2d 707.

Court's power to vacate decree of divorce or separation upon request of both parties. 3 ALR 3d 1216.

21-135.1. Waiting period before hearing on divorce or separate maintenance—reconciliation attempts. No hearing upon grounds for divorce shall be held in any action for divorce from the bonds of matrimony or for separate maintenance until at least twenty (20) days after the commencement of the action and service of process. During such period of twenty (20) days or longer, the court, upon application of one of the parties, may require a conference of the parties with a person or persons of their own choosing in order to determine whether or not a reconciliation is practicable.

In any action of divorce from the bonds of matrimony or for separate maintenance, where grounds for divorce or separate maintenance have been established, if the court finds that attempts at reconciliation are practicable and to the best interest of the family, it shall stay the proceedings for a period not to exceed ninety (90) days where there are minor children in the family.

History: En. Sec. 1, Ch. 167, L. 1963.

21-136. (5768) Relief may be adjudged, when divorce is denied. Though judgment of divorce is denied, the court may, in its discretion, in an action for divorce, provide for the maintenance of the wife and her children, or any of them, by the husband.

History: En. Sec. 190, Civ. C. 1895; re-en. Sec. 3676, Rev. C. 1907; re-en. Sec. 5768, R. C. M. 1921, Cal. Civ. C. Sec. 136.

Legislative Policy

The apparent policy of the legislature in adopting this section was to discourage the incautious granting of divorces and in doubtful cases to give the court the authority to grant a separation rather than to destroy the vinculum of the marriage, the reason for this being that a reconciliation of the parties may be accomplished by legally separating them for a time thus permitting their passions and prejudices to subside and for the further and more important reason that the children, if any, resulting from the marriage must come foremost in the court's consideration. Reed v. Reed, 130 M 409, 304 P 2d 590, 592. (Dissenting opinions, 130 M 409, 304 P 2d 590, 593, 605.)

Relief Not Requested

In divorce proceedings by husband in which wife's answer and cross action contained no reference to property settlement and no prayer for general relief, district court exceeded its jurisdiction when it made division of the sale proceeds of property and impressed plaintiff's property with a lien. Chapman v. Chapman, 137 M 544, 354 P 2d 184, 186.

Separate maintenance may be granted to the wife without any pleading therefor. Chapman v. Chapman, 137 M 544, 354 P 2d 184, 186.

Separate Maintenance

There is no authority in the Montana Civil Code whereby the courts, by statute, could grant a divorce where only separate maintenance is sought. Reed v. Reed, 130 M 409, 304 P 2d 590, 592. (Dissenting opinions, 130 M 409, 304 P 2d 590, 593, 605.)

Where a wife files a complaint seeking separate maintenance the court cannot, in finding for the wife, decree an absolute divorce in her favor, since the court may not grant any relief beyond that which is sought for by the prevailing party. Reed v. Reed, 130 M 409, 304 P 2d 590, 592. (Dissenting opinions, 130 M 409, 304 P 2d 590, 593, 605.)

Support of Wife

Under this section, providing that the district court may, in an action for divorce, make provision for the maintenance of the wife even though a decree of divorce is denied, the court did not abuse its discretion in an action instituted by the wife, in adjudging that while grounds for a divorce did not exist, in view of the apparent impossibility of the parties to live together, the husband should, for a period of two years, pay the wife \$50 every three months for her support, she then being 47 years of age, and it appearing that all the property of the parties in the accumulation of which the wife had aided materially, was in the husband's name. Carboni v. Carboni, 99 M 279, 282, 43 P 2d 634, explained in 137 M 544, 547, 354 P 2d 184.

While the codes do not in terms authorize a divorce a mensa et thoro,—from bed and board,—in effect a limited or partial divorce, the effect of this section is much akin to such a divorce. Carboni v. Carboni, 99 M 279, 282, 43 P 2d 634.

References

State ex rel. La Point v. District Court, 69 M 29, 36, 220 P 88; State ex rel. Lay v. District Court, 122 M 61, 198 P 2d 761, 767.

Collateral References

Divorce \$\infty 154, 231, 232.
27A C.J.S. Divorce \\$\\$ 159, 203, 229.

Who may institute civil contempt proceeding arising out of matrimonial action. 61 ALR 2d 1095.

Determination of paternity, legitimacy, or legitimation in action for divorce or separation, 65 ALR 2d 1381.

21-137. (5769) Expenses of action—alimony. While an action for divorce is pending the court or judge may, in its or his discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action. When the

husband willfully deserts the wife, she may, without applying for a divorce, maintain in the district court an action against him for permanent support and maintenance of herself or of herself and children. During the pendency of such action, the court or judge may, in its or his discretion, require the husband to pay as alimony any money necessary for the prosecution of the action and for support and maintenance, and executions may issue therefor in the discretion of the court or judge. The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court.

History: Ap. p. Sec. 6, p. 431, Bannack Stat.; re-en. Sec. 6, p. 458, Cod. Stat. 1871; re-en. Sec. 512, 5th Div. Rev. Stat. 1879; re-en. Sec. 1004, 5th Div. Comp. Stat. 1887; amd. Sec. 191, Civ. C. 1895; re-en. Sec. 5677, Rev. C. 1907; re-en. Sec. 5769, R. C. M. 1921. Cal. Civ. C. Sec. 137. Based on Field Civ. C. Sec. 71.

Action To Enforce Foreign Decree for Monthly Alimony

In an action to enforce payment of alimony awarded to plaintiff wife by a judgment rendered by a court in the state of Washington, held, that although the decree was not final in the sense contemplated by the full faith and credit clause of the federal constitution, article IV, section 1, the clause under the principles of comity could be applied where judgment for accrued payments was sought; held also that the evidence did not support the conclusion that by agreement and acquiescence the parties made any reduction, as mere acceptance by wife of less where amount is fixed by judgment could not discharge the husband's obligation. Espeland v. Espeland, 111 M 365, 368, 109 P 2d 792.

Alimony-How Determined

In awarding alimony upon final decree of divorce, the amount which the wife should receive is not a certain proportion of the husband's estate, but is to be determined by the equities of the case and the financial condition of the parties. Cummins v. Cummins, 59 M 225, 229, 195 P 1031

Where the court in a divorce proceeding awarded the wife practically all the estate of the husband readily convertible into cash to the amount of about \$9,000, leaving to him property consisting of a ranch and real estate, some of which was unproductive, valued at \$26,000, the decree was not open to the objection that the court had not fairly and reasonably exercised its discretion because of its refusal to increase the amount so as to make the award equal one-third of the husband's estate. Cummins v. Cummins, 59 M 225, 229, 195 P 1031.

In a proceeding for separate maintenance or divorce in which suit money, counsel fees or alimony are demanded, the wealth of the defendant husband is directly involved, since upon it depends the amount which the court in its discretion may allow for either purpose; hence the trial court did not err in permitting attorneys to give testimony, as to the value of the services rendered by plaintiff's attorney, taking into consideration the wealth of the defendant. Walker v. Hill, 90 M 111, 121, 300 P 260.

Alimony—Modification of Past and Future Installments

This section, declaring that the final judgment in a separate maintenance action may by its orders be enforced by the district court as it may in its discretion, from time to time deem necessary, is broad enough to include within its terms not only future but also past due installments of alimony, contrary to the general rule that installments already accrued constitute a vested right not alterable by the court. Woehler v. Woehler, 107 M 69, 72, 73, 81 P 2d 344.

Alimony-Pending Appeal

The supreme court has no power to allow temporary alimony or suit money pending an appeal in a divorce case. Bordeaux v. Bordeaux, 26 M 533, 535, 539, 69 P 103. See Finlen v. Henize, 27 M 107, 118, 69 P 829, 70 P 517; Bordeaux v. Bordeaux, 29 M 478, 482, 75 P 359; State ex rel. Tong v. District Court, 109 M 418, 422, 96 P 2d 918.

Where a petition of the husband to modify a separate maintenance decree, and contempt proceeding based on his failure to pay were heard together, evidence was in sharp conflict on ability of contemnor to obey the court's order but evidence was substantial that he was then and had been for some time past financially unable to meet the installments fixed by the original decree, the supreme court on appeal may not say that the court abused its

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discretion in reducing the monthly award from \$150 to \$50, nor erred in failing to find him guilty of contempt. Woehler v. Woehler, 107 M 69, 74, 81 P 2d 344.

Alimony-Review by Supreme Court

Plaintiff, in an action for divorce on the ground of extreme cruelty, had no property in her own right or means of support and was in ill health; the estate of defendant amounted to approximately \$20,000 over and above his just debts and liabilities; the court awarded plaintiff \$50 per month permanent alimony. In view of the provision of this section, vesting in the district court absolute discretion as to the alimony to be paid by the husband, and the fact that the trial court had jurisdiction to modify its order relating to alimony at any time when considered necessary or desirable, the decree in this respect was not open to reversal in the absence of a showing of abuse of discretion. Boles v. Boles, 60 M 411, 413, 414, 199 P 912.

Annulment of Marriage

In an action for the annulment of marriage on the ground of defendant wife's physical incapacity, there is no statutory authority for allowing her alimony pendente lite, attorney's fees and suit money. The court may, however, under its equity jurisdiction, in such a case grant the aforesaid allowances. State ex rel. Wooten v. District Court, 57 M 517, 189 P 233, 9 ALR 1212.

Attorney's Fees

Attorneys' fees are wholly within the discretion of the court to grant upon a showing of necessity. Bell v. Bell, 133

M 572, 328 P 2d 115, 121.

Costs and counsel fees may be allowed on motion to modify child custody. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 231, 232, overruling Wilson v. Wilson, 128 M 511, 516, 278 P 2d 219, 222, and reinstating McDonald v. McDonald, 124 M 26, 218 P 2d 929, 15 ALR 2d 1260; Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1096, 1097.

Where husband accepted the provisions for court costs and temporary support, he could not contend on appeal that wife had sufficient funds to provide for her own attorney. Crum v. Crum, 137 M 407, 352 P 2d 988, 989.

A wife's right to counsel fees in an action pending divorce is not an absolute one—she must first make a prima facie showing of necessity on a proper hearing. State ex rel. Sowerwine v. District Court of First Judicial District, 145 M 375, 401 P 2d 568.

Where wife in divorce action made no motion to require husband to pay attor-

ney's fees pending an appeal, such costs could not be awarded her later on. State ex rel. Sowerwine v. District Court of First Judicial District, 145 M 375, 401 P 2d 568.

Attorney's Fees-Additional Fees

Allowance of additional counsel fees to the wife without proper showing of necessity or showing that without the allowance of such additional fees the wife would be unable to proceed with her defense is an abuse of discretion and an error on the part of the trial court. Docotovich v. Docotovich, 125 M 56, 229 P 2d 971, 973, explained in 145 M 375, 377, 401 P 2d 568

Additional attorney's fee was properly disallowed wife where she had been found guilty of gross misconduct. Bell v. Bell, 133 M 572, 328 P 2d 115, 121.

Attorney's Fees—Contingent upon Alimony Void

A contract between an attorney and plaintiff in a suit for divorce, providing for an attorney's fee contingent upon the amount of alimony recovered, is void as against public policy. Coleman v. Sisson, 71 M 435, 445, 230 P 582.

Attorney's Fees-Temporary Fees

An order for temporary attorney's fees is in the nature of a retainer and is but an estimate by the court, exercising its best judgment, of the value of the services that can be reasonably anticipated to be necessary. Kronmiller v. Kronmiller, 136 M 101, 345 P 2d 168, 170.

In fixing an estimated amount for temporary attorney's fees to be allowed the plaintiff, the court should be governed by what is fair and reasonable, having in mind the needs of the plaintiff, the financial ability of the defendant, and the manner in which she has been accustomed to live and should leave an incentive for reconcilation rather than fix a premium for separation. Kronmiller v. Kronmiller, 136 M 101, 345 P 2d 168, 170.

Continuing Jurisdiction

Generally the court's jurisdiction is continuing in child custody matters. Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1095.

Continuation of Defense

The district court has no power, after trial and judgment for the husband, to compel the husband to pay for past services of attorneys, or expenses of the trial, except when such payment is necessary to enable the wife to continue her defense, or prepare and present a motion for a new trial or an appeal. Bordeaux v. Bordeaux, 29 M 478, 483, 75 P 359, distinguished

in 61 M 18, 23, 201 P 314. See also Albrecht v. Albrecht, 83 M 37, 46, 269 P 158.

Costs of Appeal

Although wife filed memorandum of costs as prescribed in section 93-8621, since the memorandum included not only the statutory costs but purported attorney's fees not properly granted by appellate court pending divorce action, execution did not include purported attorney's fees. State ex rel. Sowerwine v. District Court of First Judicial District, 145 M 375, 401 P 2d 568.

Effect of Judgment of Separate Maintenance

A judgment of separate maintenance does not alter the marital status except to give legal sanction to wife's living apart from her husband and it cannot validly effect a division of the property, determine property rights, or change the course of inheritance. Boggs v. Boggs, 119 M 540, 177 P 2d 869, 872.

Enforcement of Orders

There are various ways of enforcing orders directing the payment of support money in actions for divorce, the most common of which are requiring the husband to give security under section 21-140, by contempt proceedings, by execution as in the case of other money judgments, or by invoking the police power to punish the parent for willfully failing, refusing or neglecting to support under section 10-511. State ex rel. Lay v. District Court, 122 M 61, 198 P 2d 761, 767.

Jurisdiction

Proceedings for divorce undoubtedly are statutory, but jurisdiction in matters of divorce is constitutional and may not be abridged. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 232.

Maintenance Money

Although this section uses the term "alimony" generically to mean "any money necessary to enable the wife to support herself or her children," it is distinguishable from money for support of wife provided in section 21-139. Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1098.

Motion for New Trial

Defendant in an action for divorce was not bound to show affirmatively, on her application to have plaintiff pay into court money sufficient to defray costs already incurred, and those to be incurred in presenting her motion for a new trial, that the application was made in good faith and that there was a probability of her ultimate success in the litigation, before the court could properly act upon it.

Rumping v. Rumping, 41 M 33, 36, 108 P 10.

Poverty of Husband

Ordinarily where the husband commences the suit for divorce his alleged poverty will not be considered on the theory that if he has not the means to pay the required alimony pendente lite, suit money and counsel fees of his wife, he should not bring the action. State ex rel. Houtchens v. District Court, 122 M 76, 199 P 2d 272, 277.

Property Rights

A party to an action for divorce may not, by alleging a joint enterprise or partnership or by demanding an accounting, convert the divorce proceeding into any other form of action. Emery v. Emery, 122 M 201, 200 P 2d 251, 266.

The filing of a divorce action by the wife does not work a forfeiture of the defendant's property and does not confer upon the trial court the power to summarily oust him from his own home. Emery v. Emery, 122 M 201, 200 P 2d 251, 266.

If plaintiff in divorce action is the owner of specific personal property or lawfully entitled to the possession thereof and the same is wrongfully detained by defendant or others, the remedy is by action of claim and delivery and not by a restraining order issued in a divorce action. Emery v. Emery, 122 M 201, 200 P 2d 251, 265.

In a divorce action the court has no power to determine whether wife has any interest in property, the record title of which is in the husband alone. Emery v. Emery, 122 M 201, 200 P 2d 251, 264.

The court in an action for divorce has no power to divest the title of the husband to specific real or personal property or to adjudge or order an involuntary assignment or transfer thereof to the wife. Shaw v. Shaw, 122 M 593, 208 P 2d 514, 524

Where plaintiff was granted an absolute divorce from defendant wife, the court did not exceed its authority in finding and holding that the defendant wife was entitled to be reimbursed for money advanced to plaintiff, which was used to accumulate the property held by the plaintiff. Johnson v. Johnson, 137 M 11, 349 P 2d 310, distinguished in 137 M 544, 548, 354 P 2d 184, 186.

Reduction of Support and Maintenance

Award of \$700 per month for support and maintenance was reduced to \$300 where parties were married only 27 days until separation took place; plaintiff did nothing to help accumulate the financial resources held by defendant; she had been receiving about \$25 per week as wages

in Ireland prior to her marriage; she had not been accustomed to living in New York City and evidence showed that apartments were available at the cost of about \$100 per month. Reynolds v. Reynolds, 132 M 303, 317 P 2d 856, 859.

Security for Costs and Alimony

Where an absolute decree of divorce was granted the wife with provision for support and maintenance of herself and minor child, the court could properly thereafter upon a showing of change in conditions due to the willful fault of the husband, require the husband to give security for the payments required to be made to the wife; this section and section 21-139, relating to the matter, being included within the provisions of section 21-140, authorizing an order to give reasonable security under such circumstances. Wallace v. Wallace, 92 M 489, 499, 15 P 2d 915.

Separate Maintenance Allowable Independent of Divorce

The district court in the exercise of its equity jurisdiction may grant a wife a decree for separate maintenance, together with alimony, suit money and attorney's fees pending suit, asked for on the ground of willful neglect, independently of an action for divorce, and it is not divested of such jurisdiction under the maxim "expressio unius est exclusio alterius" by the provision of this section, that in case of willful desertion the wife may, without applying for a divorce, maintain such an action. State ex rel. La Point v. District Court, 69 M 29, 31, 220 P 88.

Suit Money

In an action for divorce, where the wife moves for suit money, she must show a necessity for the allowance asked; if she has sufficient means of her own to meet the costs of suit, the application should be denied. Rumping v. Rumping, 41 M 33, 36, 108 P 10.

The rules governing allowances for suit money and expenses of litigation are the same as those which apply to allowances made for temporary alimony. Rumping v. Rumping, 41 M 33, 36, 108 P 10.

It was error to allow the wife a larger amount of suit money, in an action for divorce, than the testimony showed was necessary for the purpose to which it was to be applied. Rumping v. Rumping, 41 M 33, 36, 108 P 10.

An action against the husband for legal services rendered the wife in instituting divorce proceedings, which were dismissed by her soon after their commencement, did not lie under this section, which provides that while a divorce action is pending the court or judge may require the husband

to pay suit money to enable the wife to prosecute (or defend) the action, the power thus conferred being exclusive and ancillary to, and not independent of, the divorce action. Grimstad v. Johnson, 61 M 18, 22, 201 P 314, 25 ALR 351.

Upon timely and proper application made in advance of the performance of the professional services and the incurring of expenses rested within the discretion of the trial court to grant expense money regardless of whose acts and conduct were responsible for the granting of the divorce. Bissell v. Bissell, 129 M 187, 284 P 2d 264, 269.

References

Decker v. Decker, 56 M 338, 185 P 168; Davenport v. Davenport, 69 M 405, 409, 414, 222 P 422; Poague v. Poague, 87 M 433, 434, 288 P 454; Carboni v. Carboni, 99 M 279, 43 P 2d 634; Reed v. Reed, 130 M 409, 304 P 2d 590, 593, 595 (dissenting opinion); Hurly v. Hurly, — M —, 411 P 2d 359.

Collateral References

Divorce 199-229; Husband and Wife 295, 299.

27A C.J.S. Divorce § 202 et seq.; 41 C.J.S. Husband and Wife §§ 619, 623.

24 Am. Jur. 2d 671, Divorce and Separation, § 548.

Earning capacity of husband as basis for determining alimony pendente lite. 6 ALR 192 and 139 ALR 207.

Wife's possession of independent means as affecting her right to temporary alimony, 15 ALR 781.

Financial condition of parties as affecting allowance of temporary alimony. 35 ALR 1099.

Nonpayment of temporary alimony as ground for denying right to participate in divorce proceeding. 62 ALR 663.

Appellate court's power to grant alimony, maintenance, or attorneys' fees pending appeal in matrimonial suit. 136 ALR 502.

Misconduct or fault of wife as affecting right to temporary alimony. 2 ALR 2d 307.

Husband's default, contempt, or other misconduct as affecting modification of decree for alimony, separate maintenance, or support. 6 ALR 2d 835.

Retrospective modification of, or refusal to enforce, decree for alimony, separate maintenance, or support. 6 ALR 2d 1277. Misconduct of wife to whom divorce is

Misconduct of wife to whom divorce is decreed as affecting allowance of alimony. 9 ALR 2d 1026.

Defendant's denial, in action for divorce, separate maintenance, or alimony, that parties are married as affecting plaintiff's right to temporary alimony. 11 ALR 2d 1040.

Right of former wife to counsel fees upon application, after absolute divorce, to increase or decrease alimony. 15 ALR 2d 1252.

Decree for alimony rendered in another state or country (or domestic decree based thereon) as subject to enforcement by equitable remedies or by contempt proceedings. 18 ALR 28 862.

Allowance of permanent alimony to wife against whom divorce is granted. 34 ALR

2d 313.

Reconciliation as affecting decree for ali-

mony. 35 ALR 2d 741.

Right of nonresident wife to maintain action for separate maintenance or alimony alone against resident husband. 36 ALR 2d 1369.

Death of husband as affecting alimony. 39 ALR 2d 1406.

Amount of compensation of attorney for services as to divorce in absence of contract or statute fixing amount. 56 ALR 2d 115.

Husband's right to alimony, maintenance, suit money, or attorney's fees. 66 ALR 2d 880.

Allowance as suit money against husband of expenses incurred by wife in investigating his marital transgressions. 99 ALR 2d 264.

Adequacy or excessiveness of amount of money awarded as separate maintenance or support for wife where no absolute divorce is or has been granted. 1 ALR 3d 208.

Contract, provision thereof, or stipulation waiving wife's right to counsel fees in event of divorce or separation action. 3 ALR 3d 716.

21-138. (5770) Orders respecting custody of children. In an action for divorce the court or judge may, before or after judgment, give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same.

History: Ap. p. Sec. 6, p. 431, Bannack Stat.; re-en. Sec. 6, p. 458, Cod. Stat. 1871; re-en. Sec. 512, 5th Div. Rev. Stat. 1879; re-en. Sec. 1004, 5th Div. Comp. Stat. 1887; amd. Sec. 192, Civ. C. 1895; re-en. Sec. 5678, Rev. C. 1907; re-en. Sec. 5770, R. C. M. 1921. Cal. Civ. C. Sec. 138. Field Civ. C. Sec. 73.

Cross-Reference

Children committed to Montana children's center, secs. 80-2103 to 80-2105.

Attorney's Fees

Costs and counsel fees may be awarded in custody modifications. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 231, 232, overruling Wilson v. Wilson, 128 M 511, 516, 278 P 2d 219, 222, and reinstating McDonald v. McDonald, 124 M 26, 218 P 2d 929, 15 ALR 2d 1260; Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1096, 1097.

Children's Care Paramount

While a separation agreement entered into between husband and wife prior to divorce, by which the latter was given the custody of a minor child upon consenting to support it, and releasing the former from any further contributions in that behalf, was binding upon the parties, it was not binding upon the child nor the court, which latter could require the father to contribute to the child's support notwithstanding the release, or permit him to visit if its interests would thereby be promoted, upon condition that he first make

such contribution. Kane v. Kane, 53 M 519, 524, 165 P 457.

In a proceeding looking to the modification of a decree of divorce, which made no provision for the custody, control, and education of a minor child, the infant's welfare was of paramount consideration. Kane v. Kane, 53 M 519, 524, 165 P 457.

Under this section, the interest of the children is the paramount consideration of the court. State ex rel. Floch v. District Court, 107 M 185, 190, 81 P 2d 692.

Continuing Jurisdiction

Generally the court's jurisdiction is continuing in child custody matters. Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1095.

Court May Disregard Agreement between Parents

Although the care and custody of the children of a marriage may be provided for by the parties in a private agreement binding upon the parties, the agreement is not binding upon the court or the minors, nor is the fact that the decree makes no mention of the children; hence where it was agreed between the parties that the father have the son and the mother the daughter, each released from any payments toward the care and education of the minor in charge of the other, the court on proper showing could award both children to the mother, the father to pay monthly support for both children. State ex rel. Floch v. District Court, 107 M 185, 190, 81 P 2d 692.

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Duty of Court as to Custody of Children

The court should, of its own motion, where the parents make no petition, inquire into the facts and make the necessary order for the custody of the children, and must do so when moved by either party, irrespective of whether such party was in default or not in the suit, or whether he or she was the guilty party. If a mistake is made in the first instance, the court should remedy the same on a proper showing, as soon thereafter as possible. Pearce v. Pearce, 30 M 269, 271, 272, 76 P 289.

The power of the court in a divorce suit to make provision for the children is not founded exclusively upon section 21-139, which is applicable to cases only in which the ground of divorce is the fault of the husband. Under this section the court may, in any case, before or after judgment, make provision for the children as the circumstances require. Brice v. Brice, 50

M 388, 393, 147 P 164.

The statutes expressly invest the trial judge with much discretion regarding the custody of children. Wilson v. Wilson, 128 M 511, 278 P 2d 219, 222, overruled on another point in 134 M 174, 187, 329 P 2d 225.

Habeas Corpus To Gain Custody

When decree of divorce was rendered in Utah and custody of children was granted to mother she then had the preference right. She waived this right when she offered to give up their custody and father took them to his home in Montana, and she could not deprive father of custody by habeas corpus proceedings in Montana unless he was an unfit person to have the custody, or unless it was shown that the best welfare of the children required that they be taken from him. State ex rel. Lessley v. District Court, 132 M 357, 318 P 2d 571, 574.

Interlocutory Nature

Child custody orders are interlocutory in nature. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 226; Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1097.

Jurisdiction

Although proceedings for divorce are undoubtedly statutory, jurisdiction in matters of divorce is constitutional and may not be abridged. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 232.

Modification of Order

Child custody orders are modifiable in the sound discretion of the district court for good cause shown. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 226.

Mother's affidavit on which citation for hearing on modification of custody decree was issued was properly controverted by father's verified answer. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 229.

When the custodial fitness of neither spouse is questioned a bill of exceptions and a judgment roll reflecting four modifications of custody orders in nine weeks, no matter how well intended or by whom sought or ordered, supported by undisputed testimony, is clear prima facie record of substantial change affecting the children warranting modification of decree. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 228.

Father who refuses to make payments for support of children required by the decree is not entitled to petition for modification of the decree unless the best interests and welfare of the children require the modification. Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1098.

Modification of Order-Findings

In hearings on motions to modify child custody orders, parties desiring written findings of facts and conclusions of law must move for them in writing at the close of the evidence, as the statute requires. Even then, if the evidence justifies but one conclusion, formal findings are not necessary. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 230.

In the absence of statute, the court need not make formal findings of fact in support of its order modifying the custody provisions of divorce decrees. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 229.

Modification of Order-Jurisdiction

Whether an order providing for the custody of a child in a divorce proceeding should be modified is a question which should be presented to the court in which the decree was rendered and such order cannot be modified by another court in a habeas corpus proceeding. Benson v. Benson, 121 M 439, 193 P 2d 827, 830.

An order by a California court which modified a prior California divorce decree and awarded custody of minor children to the father was void because it was made without jurisdiction where it was shown that the children were domiciled in Montana with their mother, even though the mother made a general appearance in the California court to contest the modification. Where the minor's domicil is not within the jurisdiction at the time, the "res" likewise is not within the jurisdiction. The courts may not proceed even with both parents before it. A minor has a juristic status of his own to which it is difficult indeed to deny recognition when his custody is the question before the court, and even though the contest is between his parents, who themselves have

submitted to the jurisdiction of the court. For he is the real party in interest in any such case as is evidenced by the familiar rule that in awarding his custody the paramount inquiry is always his welfare and best interests. Application of Enke, 129 M 353, 287 P 2d 19, 24, cert. den. 350 U S 923, 100 L Ed 808, 76 S Ct 212.

Mother Preferred

Other things being equal, custody in the mother is to be preferred where children are of tender years. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 226.

Order of Visitation

The privilege of visitation should not be left entirely to the discretion of the party having the child in custody. Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1097.

Right of visitation may be conditioned upon prompt payment of money decreed for support of children. Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1098.

Power To Modify Decree

On a husband's petition to modify a divorce decree so as to permit him to visit his minor child, the time, place, and duration of the visits, his conduct during such visits, and the extent to which he might have the child in his custody, were all proper subjects for regulation by the court. Kane v. Kane, 53 M 519, 525, 165 P 457.

While a decree fixing the custody of minor children in a divorce proceeding is final upon the conditions then existing, the court may modify it upon a showing that the then conditions have changed, the welfare of the children being the paramount consideration. Jewett v. Jewett, 73 M 591, 595, 237 P 702.

Where by the decree in a divorce suit defendant husband had been awarded the custody of two children of tender age, the court finding inter alia that both parties were proper persons to have their custody, and later the father lost his position necessitating his removal from the state in search of employment, the court was justified in modifying the decree by awarding the custody of the minors to the mother who had remarried in the meantime and was able to furnish them a comfortable home. Jewett v. Jewett, 73 M 591, 595, 237 P 702.

Residence of Children

Limitations on residence of children are to be conditioned by what appears best for the children and the trial judge is invested with much discretion in these matters. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 230; Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1097.

There was no abuse in the discretion exercised by the district court in refusing to restrict residence of children where their well-being was not so much dependent upon continuance or change of their present residence as upon change in their parents' hearts. Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1097.

Review by Supreme Court as to Custody of Children

Where the district court found that defendant was a man much attached to his minor children, had at all time provided for them in a suitable manner and taken much interest in their education and general welfare, was a fit and proper person to have their care and custody, that the children had expressed a desire to live with him, and that it was for their best interest that they should be kept and raised together, and therefore awarded their custody to him, subject to the right of the mother to visit them at reasonable times, the presumption obtains, nothing appearing in the record on appeal to the contrary, that the court exercised the discretion lodged in it, and its action will be affirmed. Boles v. Boles, 60 M 411, 413, 199 P 912.

The district judge who hears the testimony in a divorce suit in which the custody of minor children is involved has a superior advantage in determining the controversy, and therefore his decision will not be disturbed on appeal except upon a clear showing of abuse of the discretion lodged in him. Jewett v. Jewett, 73 M 591, 595, 237 P 702.

The trial court's decision relating to the custody of a minor child will not be disturbed except upon a clear showing of an abuse of discretion. Campbell v. Campbell, 126 M 118, 245 P 2d 847, 849.

In the absence of a strong showing of abuse of discretion by district court, custody orders should not be disturbed on appeal. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 226.

Special Order after Final Judgment Appealable

A special order made after final judgment relating to the custody of the children was an appealable order under section 93-8003 but for the appeal to be effective it must be taken within sixty days after the order is made or entered or filed with the clerk under section 93-9004. McVay v. McVay, 128 M 31, 270 P 2d 393, 394.

Stay of Appeal

An appeal from an order modifying divorce decree does not stay the enforcement of the order. It can only be stayed by an application for an order staying the proceedings under section 93-8003, sub-

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division 2. Application of Nelson, 132 M 252, 316 P 2d 1058, 1059.

Where Evidence Withheld, Not Ground for New Trial

Where plaintiff wife was granted a decree of divorce as well as custody of a six-year-old child, and the defendant asked for a new trial on the ground that he was in possession of evidence that plaintiff was not a proper person to have such custody, but admitted that he had knowledge of such fact at the time of trial but did not offer proof thereof out of deference to his wife and child, the new trial was properly denied, the statute not providing for a new trial on such ground. The decree is always subject to modification upon a proper showing of unfitness, because the child is a ward of the court. Wolz v. Wolz, 110 M 458, 462, 102 P 2d 22.

References

Wallace v. Wallace, 92 M 489, 499, 15 P 2d 915; Haynes v. Fillner, 106 M 59, 77, 75 P 2d 802; State ex rel. Lay v. District Court, 122 M 61, 198 P 2d 761, 767; State ex rel. McVay v. District Court, 126 M 382, 251 P 2d 840, 845.

Collateral References

Divorce 289-303. 27B C.J.S. Divorce § 303 et seq.

Jurisdiction to award custody of child having legal domicil in another state. 4 ALR 2d 7

Material facts existing at time of rendition of decree of divorce but not presented to court as ground for modification of provision as to custody of child. 9 ALR 2d 623.

Nonresidence as affecting one's right to custody of child. 15 ALR 2d 432.

Right of former wife to counsel fees upon application, after absolute divorce, to modify order as to support or custody of child or children. 15 ALR 2d 1270.

Power of court, on its own motion, to modify provisions of divorce decree as to custody of children, upon application for other relief. 16 ALR 2d 664.

Right to custody of child as affected by

death of custodian appointed by divorce decree, 29 ALR 2d 258.

Alienation of child's affections as af-fecting custody award. 32 ALR 2d 1005. Consideration of investigation by wel-

fare agency or the like in making awards between parents of children. 35 ALR 2d

Purview of charge for "college education." 36 ALR 2d 1323.

Service of notice to modify divorce decree as to child's custody upon attorney who represented opposing party. 42 ALR 2d 1115.

Remarriage of parent as ground for modification of divorce decree as to custody of child. 43 ALR 2d 363.

Retention of power with respect to change of names of children. 53 ALR 2d

Race as factor in custody award or proceeding. 57 ALR 2d 678.

Religion as factor in awarding custody of child in divorce action. 66 ALR 2d 1410.

Opening or modification of divorce decree as to custody or support of child not provided for in the decree. 71 ALR 2d

Court's power to modify child custody order as affected by agreement which was incorporated in divorce decree. 73 ALR 2d 1444.

Mental health of contesting parent as factor in change of child custody. 74 ALR 2d 1078.

Right of wife to allowance for expense money and attorney's fees in action by or against husband, without divorce, for child custody. 82 ALR 2d 1088.

"Split," "divided," or "alternate" cus-

tody of child. 92 ALR 2d 695. Violation of child support payment pro-

vision of decree as affecting custody visitation provision. 95 ALR 2d 118.

Propriety of separating children by awarding custody to different parents. 98 ALR 2d 926.

Avoidance of conflict over visitation. 98 ALR 2d 941.

Propriety of court conducting private interview with child in determining custody. 99 ALR 2d 954.

21-139. (5771) Support of wife and children on divorce or separation granted to wife. Where a divorce is granted for an offense of the husband. the court may compel him to provide for the maintenance of the children of the marriage and to make such suitable allowance to the wife for her support during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively, and the court may, from time to time, modify its orders in these respects; provided, however, that upon proof of the remarriage of a divorced wife, after the final judgment in a divorce action, the court must order a modification of

the judgment by annulling the provisions of the judgment directing the payment of money for the support of the wife.

History: En. Sec. 193, Civ. C. 1895; re-en. Sec. 3679, Rev. C. 1907; re-en. Sec. 5771, R. C. M. 1921; amd. Sec. 1, Ch. 69, L. 1935. Cal. Civ. C. Sec. 139. Field Civ. C. Sec. 73.

Cross-Reference

Support orders, reciprocal enforcement, secs. 94-901-1 to 94-901-18.

Ability To Pay Must Support Judgment

Evidence showing plaintiff's means some five years before the suit was brought, but not what his financial condition was at the time of the trial nor what his earning capacity was, would not support judgment, imposition of an obligation to pay maintenance being to no purpose in the absence of a showing of ability to pay. Herrin v. Herrin, 103 M 469, 475, 63 P 2d 137.

Alimony Allowed When Both Parties Granted Divorce

Although the court grants a divorce to both parties, this should not preclude awarding alimony, since, otherwise, the wife would be left without means of support. Burns v. Burns, 145 M 1, 400 P 2d 642.

Alimony as Lien on Homestead

In a divorce case the court may in awarding alimony to the wife make the award a lien on the homestead. Bast v. Bast, 68 M 69, 217 P 345.

Alimony-Award in Lump Sum

While the awarding of alimony is largely discretionary and alimony may properly be allowed a wife in a lump sum, where the only property of substantial value owned by defendant husband consisted of a farm worth about \$18,000, which would have to be sold to satisfy a judgment for \$14,000 alimony, and the record did not disclose that the wife had ability in money matters or would, if she received that amount, use it wisely for either her own or the children's benefit, a monthly or other periodical allowance was the better practice. Bristol v. Bristol, 65 M 508, 211 P 205.

Though alimeny may be awarded in a lump sum, by so doing the court fixes it without reference to the wife's continuing need, and while the provision may be increased, the court exhausts its power to reduce it, and she or her estate benefits in spite of her remarriage, later acquisition of income or property, or her death; it is better practice to provide a monthly or other periodical allowance unless its payment is endangered by the husband's

lack of industry or other compelling reason, and if monthly alimony can be safeguarded by security, a lump sum should not be awarded; division of a set sum into monthly installments is not properly designated a lump sum. Lewis v. Lewis, 109 M 42, 46, 94 P 2d 211.

An award of alimony in a lump sum should be supported by some impelling reason for its necessity or desirability. Stefonick v. Stefonick, 118 M 486, 167 P 2d 848, 855, 164 ALR 1211.

Alimony—Award in Lump Sum—Bars Appeal from Award

Where plaintiff wife in a divorce suit accepts an award of alimony in a lump sum she is barred from appealing from the award, but her right of appeal and her right to apply to the trial court for modification of the decree under this section are independent rights based upon different statutes, the former right being limited to a certain time, and the latter being dependent upon conditions and circumstances. State ex rel. Tong v. District Court, 109 M 418, 423, 96 P 2d 918.

Alimony—Award in Lump Sum—Not Final unless Decree so Indicates

If the district court awards alimony in gross, either upon an agreement of the parties or after a hearing where there has been a full, fair and honest disclosure of all conditions and circumstances, the award becomes final after the expiration of time for appeal, and is not subject to modification under the provisions of this section, provided the decree indicates that the award relieves the husband of all future obligation to support. State ex rel. Tong v. District Court, 109 M 418, 425, 96 P 2d 918.

Alimony-Determination of Amount

In awarding alimony upon final decree of divorce, the amount which the wife should receive is not a certain proportion of the husband's estate, but is to be determined by the equities of the case and the financial condition of the parties. Cummins v. Cummins, 59 M 225, 229, 195 P 1031.

Where the court in a divorce proceeding awarded the wife practically all the estate of the husband readily convertible into cash to the amount of about \$9,000, leaving to him property consisting of a ranch and real estate, some of which was unproductive, valued at \$26,000, the decree was not open to the objection that the court had not fairly and reasonably exercised its discretion because of its refusal to increase the amount so as to make

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the award equal one-third of the husband's estate. Cummins v. Cummins, 59 M 225, 229, 195 P 1031.

Plaintiff, in an action for divorce on the ground of extreme cruelty, had no property in her own right or means of support and was in ill health; the estate of defendant amounted to approximately \$20,-000 over and above his just debts and liabilities; the court awarded plaintiff \$50 per month permanent alimony. In view of the provision of this section, vesting in the district court absolute discretion as to the alimony to be paid by the husband, and the fact that the trial court had jurisdiction to modify its order relating to alimony at any time when considered necessary or desirable, the decree in this respect was not open to reversal in the absence of a showing of abuse of discretion. Boles v. Boles, 60 M 411, 413, 199 P 912.

Contributions made by the wife to the husband during marriage may be considered by the court in awarding alimony. Bast v. Bast, 68 M 69, 77, 217 P 345.

In an action for divorce by the wife the court may, in addition to allowing her periodical sums for the support and maintenance of a minor child, award her alimony in gross. Bast v. Bast, 68 M 69, 77, 217 P 345.

In awarding alimony in a final decree of divorce the amount which the wife should receive is not measured by the value of any certain portion of the husband's estate, but is to be determined by the equities of the case, having due regard for the financial condition and necessities of the parties. Wandel v. Wandel, 76 M 160, 165, 248 P 864.

Where plaintiff husband in a divorce suit had some property and had regular employment at \$80 per month, and for some time prior to trial defendant wife had been compelled to support herself and at the time of the trial she was without employment or property, an award to her of \$25 per month for twenty months was not an abuse of discretion. Wandel v. Wandel, 76 M 160, 165, 248 P 864.

The awarding of alimony is largely a matter of discretion in the district court, based not upon a certain proportion of the husband's income or property, but on the equities of the case, i. e., the means of the husband and the needs of the wife, or the financial condition of the parties; the husband's debts should be taken into consideration and deducted from his income or property; where his debts greatly exceed his assets, his ability to pay should for practical purposes be measured entirely by his income. Lewis v. Lewis, 109 M 42, 45, 48, 94 P 2d 211.

Where husband's financial statement was presented by the wife in support of her own case and certified as a correct statement of his assets, wife could not complain on appeal that court abused its discretion in basing its award on the figures in the statement. Burns v. Burns, 145 M 1, 400 P 2d 642.

Alimony-Modification of Decree

Where there is no substantial change in the financial status of person seeking to have the amount of alimony lowered, there is no justification for modifying the decree awarding alimony. The fact that the person seeking the reduction has his real property tied up by the fact that his divorced spouse has pending an action claiming a one-half interest in the property so that he is unable to collect an unpaid amount due him for the purchase of the land by a third person does not amount to a substantial change in his financial status. McLeod v. McLeod, 126 M 32, 243 P 2d 321.

Modification of an award may be properly made in the court which rendered the decree upon a proper showing by the party seeking such modification. Burns v. Burns, 145 M 1, 400 P 2d 642.

The trial judge in his discretion must weigh the relative circumstances of the parties in light of the evidence presented in determining whether conditions demand a variation, alteration, or revocation of alimony and support payments. Daniels v. Daniels, — M —, 409 P 2d 824.

Alimony—Not Allowable When Husband is Granted the Divorce

Under this section, and in the absence of legislation permitting it, the district court is without authority to compel the husband to whom a divorce has been properly granted for offense of the wife to make provision for her support. Such support can only be awarded where divorce is granted the wife for the husband's offense. Bischoff v. Bischoff, 70 M 503, 512, 226 P 508. See also Damm v. Damm, 82 M 239, 249, 266 P 410.

Where the husband is granted a divorce for the wife's willful desertion, the court has no authority, under this section, to allow the wife permanent alimony. Albrecht v. Albrecht, 83 M 37, 44, 269 P 158.

Where a divorce is granted for an offense of the husband, the district court may, under this section, compel him to make suitable allowance to the wife for her support during her life, but where it is granted for an offense of the wife it is without jurisdiction to make an award of permanent alimony to her; if made, it is void and subject to direct or collateral attack at any time, unaffected by the consent of the parties. Grush v. Grush, 90

M 381, 386, 3 P 2d 402, explained in 111 M 104, 108, 106 P 2d 337.

Allowance for Expenses Incident to Appeal, Discretionary

While the right of a wife to appeal from an award of alimony in a divorce proceeding is absolute and fixed by law, the matter of allowance for expenses incident to the appeal and of maintenance during appeal is discretionary with the trial court. State ex rel. Tong v. District Court, 109 M 418, 421, 96 P 2d 918.

Amending Decree To Correct Error, Years Later

Where findings of fact and conclusions of law declared that both plaintiff wife and minor children should share in a \$15 weekly allowance as the parties had agreed, but the decree by mistake or inadvertence omitted the wife's name as a participant, as against the contention that such an amendment would in effect substitute a new judgment, the court may properly allow the amendment that she participate, eight years later, after the children have reached their majority, under this section and its inherent power to correct errors of clerk, judge or counsel, to speak the actual decision, either immediately or years later. Judgment must conform to verdict, decision or findings in substantial particulars. Morse v. Morse, 116 M 504, 507, 154 P 2d 982.

Appellate Review

On review, the appellate court will look critically at determination of an award only if it is shown to be unsupported by the evidence before the trial court of the changing situations of the party. Daniels v. Daniels, — M —, 409 P 2d 824.

Attempt at Modification on Hearing Contempt Charge

Refusal of the trial court to hear contemnor's application for modification of the divorce decree not made until hearing of the contempt charge was in progress, of which application no notice had been given to the wife, was not an abuse of discretion. Any modification of an order awarding alimony could have no effect upon the question of the failure of relator to make any effort to comply with the decree before any attempted modification. In instant case, hearing on modification was denied but set for a later date. State ex rel. Paganini v. District Court, 107 M 195, 199, 81 P 2d 697.

Contempt, Where Evidence Sufficient To Support

Where relator, on the last day on which he was required to make payment of alimony, gave several mortgages on his personal property and used the money to pay past due promissory notes, indicating that he was able to borrow money and could have paid at least part of the alimony and evinced a desire to avoid payment thereof, inter alia, was sufficient evidence to support the judgement of contempt. State ex rel. Paganini v. District Court, 107 M 195, 197, 81 P 2d 697.

Enforcement of Orders

A court which severs the marriage ties by granting a valid decree of divorce possesses the necessary power to compel the ex-husband to support his minor children. State ex rel. Lay v. District Court, 122 M 61, 198 P 2d 761, 767.

Failure To Pay Alimony-Contempt

On supervisory control to review a judgment of contempt for failure of relator to pay alimony, he asserting his inability to comply therewith, he was in no position to urge that he was not bound by the judgment from which he did not appeal and which he had made no attempt to modify on the ground that much of the property found by the trial court to have been his belonged to his mother, ownership of such property not having been controlling on the question of contempt. State ex rel. Paganini v. District Court, 107 M 195, 197, 81 P 2d 697.

To avoid being in contempt for failure to pay alimony, the defendant must go into court, relate the circumstances surrounding such failure, and pray for a revocation or modification of the order directing him to make such payments, Daniels v. Daniels, — M —, 409 P 2d 824.

Good Defense on Failure To Pay Alimony—Contempt

Involuntary and noncontumacious inability to obey an order of court in a divorce proceeding that the husband pay the wife a given amount per month for the support of their minor children is a good defense to a charge of contempt for failure to pay. State ex rel. Floch v. District Court, 107 M 185, 193, 81 P 2d 692.

A decree concerning alimony or maintenance is conclusive as to the circumstances existing when it is entered, but when the husband can show that his financial situation has deteriorated from the time when the order was first entered, such inability to pay will warrant a modification of the support order. Daniels v. Daniels, — M —, 409 P 2d 824.

Ability of the husband to borrow for the needs of his own family does not warrant a finding that he is not in good faith in not complying with a support order, in such case, the trial court must exercise its discretion when deciding upon the particu-

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lar facts before it. Daniels v. Daniels, — M —, 409 P 2d 824.

"Maintenance Money" Distinguished

The term "alimony" as used in this section is distinguishable from "maintenance money" provided by section 21-137. Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1098.

Modification of Custody Orders

Costs and counsel fees may be allowed on motion to modify child custody. Trudgen v. Trudgen, 134 M 174, 329 P 2d 225, 231, 232, overruling Wilson v. Wilson, 128 M 511, 516, 278 P 2d 219, 222, and reinstating McDonald v. McDonald, 124 M 26, 218 P 2d 929, 15 ALR 2d 1260; Barbour v. Barbour, 134 M 317, 330 P 2d 1093, 1096, 1097.

Modification of Decree for Support

A modification of a decree of divorce embodying a provision for the support of the wife or children ought to be made only upon good cause shown. Brice v. Brice, 50 M 388, 393, 147 P 164.

Where a divorced wife makes application for an increased allowance for her own support, or that of her children whose custody was decreed to her, it must appear that her or their needs are such as to render a larger allowance necessary, and that the husband, by reason of a change in his circumstances, is able to pay the additional amount, the burden of proof being upon the applicant. Brice v. Brice, 50 M 388, 393, 147 P 164, explained in 109 M 418, 422, 96 P 2d 918.

The parties to a divorce proceeding in which a certain allowance is made to

The parties to a divorce proceeding in which a certain allowance is made to the wife for her support, by failing to appeal from the order within time, are conclusively bound thereby, even though the allowance prove inadequate. Brice v. Brice, 50 M 388, 393, 147 P 164.

Orders as to Property

As against the contention that the court in a divorce action had no authority to make an order to convey property, etc., held, that the question could not be reached without the judgment roll before the court, and that even if the issue as to property was not sufficiently tendered by the ordinary allegations of a divorce complaint, under the law various causes of action within the court's jurisdiction may be intermingled, joined in the pleadings, or tendered by evidence introduced, without objection. Under section 93-2301, the court must try such issues and afford such relief as the pleadings and evidence warrant. State ex rel. Enochs v. District Court, 113 M 227, 233, 123 P 2d 971.

This section authorizing the court to make such suitable allowance to the wife

for her support as the court may deem just does not authorize the court, by decree, to vest in the wife the title to the husband's property. Rufenach v. Rufenach, 120 M 351, 185 P 2d 293, 294.

What Not Deemed Excessive nor Insufficient Award

The fixing of the amount of an award in lieu of alimony in a divorce action is peculiarly within the discretion of the trial judge; hence where the assets of the husband, in the main acquired by him prior to the marriage, amounted to \$25,000, among which however there was a note of his son for \$12,000 which the court apparently considered of little or no value, an award of \$4,000, claimed by the husband as excessive, and by the wife as insufficient, upheld. Detert v. Detert, 115 M 313, 322, 142 P 2d 215.

When Equity Will Uphold Separation Agreement Made Prior to Divorce

Where husband, prior to divorce entered into a separation agreement to pay his wife a monthly sum and she thereafter sued to enforce payment thereof, and he alleged in his answer that the agreement was executed collusively in aid of the subsequent divorce and was therefore void as against public policy; the answer not stating a defense under prior holdings of the court, the court granted the wife judgment on the pleadings under the rule of equity that he could not accept the benefits and shirk the burdens, particularly where she relinquished her property rights. Ryan v. Ryan, 111 M 104, 107, 106 P 2d 337.

Where Decree Did Not Indicate Lump Sum Final

Where the decree in a divorce action did not in clear and unequivocal language indicate that it was final in the sense that it relieved the husband from further obligation to support, the presumption obtained that the court retained jurisdiction to modify the decree under this section; hence the remedy by petition for modification of the decree was available to relatrix applying for writ of supervisory control to annul an order dismissing her petition for allowance of costs of appeal and maintenance during appeal and writ did not lie. State ex rel. Tong v. District Court, 109 M 418, 425, 96 P 2d 918.

Where Petition for Modification Should Be Heard before Contempt

Where the husband petitioned for modification of a decree for monthly payments for support of minor children on the ground he was unable to comply, before being charged with contempt, the court committed error in declining to hear the

petition before he had purged himself of the alleged contempt, since if contemnor could have maintained his petition, he might have made a good defense against the contempt charge as to past due payments and had future payments modified. State ex rel. Floch v. District Court, 107 M 185, 193, 81 P 2d 692.

References

Klus v. Lamire, 71 M 445, 230 P 364: Wallace v. Wallace, 92 M 489, 499, 15 P 2d 915; Johnson v. Johnson, 137 M 11, 349 P 2d 310, 312.

Collateral References

Divorce@=231-247, 306-310.

27A C.J.S. Divorce § 228 et seq.; 27B C.J.S. Divorce §§ 319-322. 24 Am. Jur. 2d 724, Divorce and Separa-

tion, § 600.

Jurisdiction of court granting divorce to control custody of child as affected by assumption of jurisdiction by juvenile court. 11 ALR 147; 78 ALR 317 and 146 ALR 1154.

Right to impose fine for failure to pay

alimony. 14 ALR 717.

Wife's possession of independent means as affecting her right to allowance for support of her children. 15 ALR 781.

Death of husband as affecting alimony. 18 ALR 1040 and 39 ALR 2d 1406.

Alimony as affected by remarriage. 30 ALR 79; 64 ALR 1269; 112 ALR 246 and 48 ALR 2d 270.

Reconciliation as affecting decree for alimony or support money. 40 ALR 1239 and 35 ALR 2d 707.

Duty of father to support child as affected by decree which awards general custody to him but permits mother to have custody part of time. 52 ALR 286.

Garnishment or attachment of property to enforce order or decree for alimony or allowance in suit for divorce or separa-

tion. 56 ALR 841.

Power of court to modify decree for support, alimony, or the like, based on agreement of parties. 58 ALR 639; 109 ALR 1068 and 166 ALR 675.

Gift by husband to defraud wife of alimony. 64 ALR 496 and 49 ALR 2d 521. Gratuities or expectations as affecting

amount of alimony. 66 ALR 219.

Power of court to modify decree as to custody, as affected by absence of parent or child from jurisdiction. 70 ALR 526.

Extraterritorial effect of modified decree as to custody of child. 72 ALR 448; 116 ALR 1299 and 160 ALR 400.

Jurisdiction of court of state of which neither party is a resident over suit between husband and wife for alimony or division of property rights without divorce. 74 ALR 1242.

Habeas corpus for custody of child as affected by pending suit for divorce or separation. 82 ALR 1146.

Power to reopen decree of divorce which is silent as to, or expressly provides against, alimony, so as to permit modifica-

tion in that regard. 83 ALR 1248.

Validity and enforceability of agreement to pay more or less alimony than that provided for by decree or order. 84 ALR 299.

Power of court which denies divorce or legal separation to award custody or make provision for support of child. 113 ALR 901 and 151 ALR 1380.

Combining in one stated sum amount allowed as alimony and amount allowed for support of children. 124 ALR 1324.

Propriety of direction that specific property of husband be transferred to wife as alimony, or in lieu of or in addition to, alimony. 133 ALR 860.

Education as element in allowance for benefit of child in decree of divorce or separation. 133 ALR 902 and 56 ALR 2d

Propriety and effect of provision in decree in divorce suit in respect of the policy of insurance on life of husband. 145 ALR 522.

Right of parent to recover for injury to or death of minor child as affected by award of custody of child to another. 147

Concealment or misrepresentation of financial condition by husband or wife as ground of release from decree of divorce as regards alimony or property settlement. 152 ALR 190.

Power of court to award alimony or property settlement in divorce suit as affected by failure of pleading or notice to make a claim therefor. 152 ALR 445.

Income tax as a factor in fixing or readjusting alimony. 153 ALR 1041.

Specific performance, or other equitable enforcement, of agreement for wife's sup-

port or alimony. 154 ALR 323.

Provision in divorce or separation decree incorporating or based upon agreement for alimony or support as enforceable by contempt proceedings. 154 ALR

Final decree or dismissal of suit for divorce as affecting subsequent enforceability by contempt or otherwise of past defaults in payment of temporary mony. 154 ALR 530.

Order in divorce or separation proceedings concerning removal of child from jurisdiction, and award of custody to non-

resident. 154 ALR 552.

Propriety and effect of anticipatory provision in decree for alimony in respect of remarriage or other change of circumstances. 155 ALR 609.

Right to credit on accrued support pay-

ments for time child is in father's custody or for other voluntary expenditures. 2 ALR 2d 831.

Validity of provision of separation agreement for cessation or diminution of payments for wife's support upon specified event. 4 ALR 2d 732.

· Husband's default, contempt, or other misconduct as affecting modification of decree for alimony, separate maintenance, or support. 6 ALR 2d 835.

Retrospective modification of, or refusal to enforce, decree for alimony, separate maintenance, or support. 6 ALR 2d 1277.

Support provisions of judicial decree for order as limit of father's liability for expenses of child. 7 ALR 2d 491.

Defenses available to husband in civil suit by wife for support. 10 ALR 2d 466.

Right to punish for contempt for failure to obey alimony decree either beyond power or jurisdiction of court or merely erroneous. 12 ALR 2d 1059.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance, 18 ALR 2d 10.

Death of parent as affecting decree for support of child. 18 ALR 2d 1126.

Pension of husband as resource which court may consider in determining amount of alimony. 22 ALR 2d 1421.

Allowance of permanent alimony to wife against whom divorce is granted. 34 ALR 2d 313.

Right to custody of child as affected by death of custodian appointed by divorce decree. 39 ALR 2d 258.

Alimony as affected by wife's remarriage, in absence of controlling specific statute. 48 ALR 2d 270.

Validity, construction, and effect of provision in antenuptial contract forfeiting property rights of innocent spouse on separation or filing divorce or other matrimonial action. 57 ALR 2d 942.

Validity and effect, as between former spouses, of agreement releasing father from further payment of child support

provided for in earlier divorce decree. 57 ALR 2d 1139.

Allowance of alimony in lump sum in action for separate maintenance without divorce, 61 ALR 2d 946.

Father's liability for support of child furnished after entry of decree of absolute divorce not providing for support. 69 ALR 2d 203.

Construction and effect of clause in divorce decree providing for payment of former wife's future medical expenses. 71 ALR 2d 1236.

Father's criminal liability for desertion of or failure to support child where divorce decree awards custody to another. 73 ALR 2d 960.

Husband's death as affecting periodic payment provisions of separation agreement. 75 ALR 2d 1085.

Allocation or apportionment of previous combined award of alimony and child support. 78 ALR 2d 1110.

Construction and effect of provision in separation agreement that wife is to have portion of "income," "total income," "net income," and the like. 79 ALR 2d 609.

Right to credit for payments on temporary alimony pending appeal, against liability for permanent alimony. 86 ALR 2d 696.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR 2d 7.

Remarriage of parent as basis for modification of amount of child support provision of divorce decree. 89 ALR 2d 106.

Provision in divorce decree against mother's husband, not the father of her illegitimate child, for its support. 90 ALR 2d 583.

Husband's right to set off wife's debt against alimony or child support payments. 100 ALR 2d 925.

Court's establishment of trust to secure alimony or child support in divorce proceedings. 3 ALR 3d 1170.

DECISIONS UNDER FORMER LAW

Modification of Decree for Support

As the law stood in 1894, one who had become unable to pay alimony adjudged against him in a divorce proceeding could

institute proceedings seeking a modification of the judgment. State ex rel. Nixon v. District Court, 14 M 396, 398, 40 P 66.

21-140. (5772) Security for maintenance and alimony. The court or judge may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case.

History: En. Sec. 194, Civ. C. 1895; 5772, R. C. M. 1921. Cal. Civ. C. Sec. 140. re-en. Sec. 3680, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 74.

Alimony as Lien on Homestead

In a divorce case the court may, in awarding alimony to the wife, make the award a lien on the homestead. Bast v. Bast, 68 M 69, 77, 217 P 345.

Change in Conditions

Where an absolute decree of divorce was granted the wife with provision for support and maintenance of herself and minor child, the court could properly thereafter upon a showing of change in conditions due to the willful fault of the husband, require the husband to give security for the payments required to be made to the wife; sections 21-137 and 21-139, relating to the matter, being included within the provisions of this section, authorizing an order to give reasonable security under such circumstances. Wallace v. Wallace, 92 M 489, 499, 15 P 2d 915.

Husband May Be Required To Execute Mortgage To Secure Payment

Under this section the trial court in a

divorce proceeding in awarding alimony may require the defendant husband to execute a mortgage on certain or all of his property for a definitely limited amount and for a definite period as security, and enforce the same in case of nonpayment by any remedy applicable to the case. Lewis v. Lewis, 109 M 42, 47, 94 P 2d 211.

References

Decker v. Decker, 56 M 338, 185 P 168; Coleman v. Sisson, 71 M 435, 445, 230 P 582; State ex rel. Enochs v. District Court, 113 M 227, 234, 123 P 2d 971; Stefonick v. Stefonick, 118 M 487, 167 P 2d 848, 855, 164 ALR 1211.

Collateral References

Divorce 244; Husband and Wife 2934.

27B C.J.S. Divorce § 274; 42 C.J.S. Husband and Wife § 625.

24 Am. Jur. 2d 833, Divorce and Separation, § 728.

21-141. (5773) If wife has sufficient support, court may withhold allowance. When the wife has a separate estate sufficient to give her proper support, the court or judge, in its or his discretion, may withhold any allowance to her out of the property of the husband.

History: En. Sec. 195, Civ. C. 1895; re-en. Sec. 3681, Rev. C. 1907; re-en. Sec. 5773, R. C. M. 1921. Cal. Civ. C. Sec. 142.

Collateral References

Divorce 213, 225, 238; Husband and Wife 288.

27A C.J.S. Divorce §§ 209, 223, 233; 42 C.J.S. Husband and Wife § 612.

Wife's possession of independent means as affecting her right to allowance for support of her children, 15 ALR 781.

21-142. (5774) Property may be subjected to support and education of children. The property of the husband and wife may be subjected to the support and education of the children, in such proportions as the court deems just, or the property of the guilty party only may be subjected to such support and education.

History: En. Sec. 196, Civ. C. 1895; re-en. Sec. 3682, Rev. C. 1907; re-en. Sec. 5774, R. C. M. 1921. Cal. Civ. C. Sec. 143.

References

Johnson v. Johnson, 137 M 11, 349 P 2d 310, 312.

Collateral References

Divorce 306-308; Husband and Wife 2991/2.

27B C.J.S. Divorce §§ 319-321; 42 C.J.S. Husband and Wife § 625.

Education as element in allowance for benefit of child in decree of divorce or separation. 133 ALR 902 and 56 ALR 2d 1207.

21-143. (5775) Legitimacy of issue—divorce for adultery of husband. When a divorce is granted for the adultery of the husband, the legitimacy of children of the marriage begotten of the wife before the commencement of the action is not affected.

History: En. Sec. 197, Civ. C. 1895; re-en. Sec. 3683, Rev. C. 1907; re-en. Sec. 5775, R. C. M. 1921. Cal. Civ. C. Sec. 144. Field Civ. C. Sec. 62.

Collateral References
Bastards € 1.
10 C.J.S. Bastards §§ 1, 2.

21-144. (5776) Legitimacy of issue—divorce for adultery of wife. When a divorce is granted for the adultery of the wife, the legitimacy of children begotten of her before the commission of the adultery is not affected; but the legitimacy of other children of the wife may be determined by the court, upon the evidence in the case. In every such case all children, begotten before the commencement of the action, are to be presumed legitimate until the contrary is shown.

History: En. Sec. 198, Civ. C. 1895; re-en. Sec. 3684, Rev. C. 1907; re-en. Sec. 5776, B. C. M. 1921. Cal. Civ. C. Sec. 145. Field Civ. C. Sec. 63.

Collateral References
Bastards 1, 3, 8.
10 C.J.S. Bastards §§ 1-3, 16.

21-145. (5777) Disposition of homestead on divorce. In case of the dissolution of the marriage by the judgment of a court of competent jurisdiction, the homestead, if selected from the separate property of either husband or wife, shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party.

History: En. Sec. 199, Civ. C. 1895; re-en. Sec. 3685, Rev. C. 1907; re-en. Sec. 5777, R. C. M. 1921. Cal. Civ. C. Sec. 146.

References

Thrift v. Thrift, 54 M 463, 171 P 272; Johnson v. Johnson, 137 M 11, 349 P 2d 310, 312.

Collateral References

Divorce 249 (6). 27B C.J.S. Divorce §§ 293, 294. 24 Am. Jur. 2d 844, Divorce and Separation, § 738.

21-146. (5778) Disposition of homestead on divorce—order of court concerning. The court, in rendering a judgment of divorce, must make such order for the disposition of the homestead as in this chapter provided.

History: En. Sec. 200, Civ. C. 1895; re-en. Sec. 3686, Rev. C. 1907; re-en. Sec. 5778, R. C. M. 1921. Cal. Civ. C. Sec. 147.

Collateral References

Divorce 249 (6). 27B C.J.S. Divorce §§ 293, 294.

21-147. (5779) Disposition of homestead on divorce—subject to revision on appeal. The disposition of the homestead, as above provided, is subject to revision on appeal.

History: En. Sec. 201, Civ. C. 1895; re-en. Sec. 3687, Rev. C. 1907; re-en. Sec. 5779, R. C. M. 1921. Cal. Civ. C. Sec. 148.

Collateral References
Divorce©=280.
27B C.J.S. Divorce § 284.

21-148. (5780) Poor woman may sue without costs. Any woman suing for a divorce, who shall make it appear to the court that she is poor and unable to pay the expenses of such suit, shall be allowed by the court to prosecute her suit without costs.

History: En. Sec. 7, p. 431, Bannack Stat.; re-en. Sec. 7, p. 459, Cod. Stat. 1871; amd. Sec. 1, p. 45, L. 1876; re-en. Sec. 513, 5th Div. Rev. Stat. 1879; re-en. Sec. 1005, 5th Div. Comp. Stat. 1887; re-en. Sec. 202, Civ. C. 1895; re-en. Sec.

3688, Rev. C. 1907; re-en. Sec. 5780, R. C. M. 1921.

Collateral References
Divorce©189.
27A C.J.S. Divorce § 197.

21-149. (5781) Notice of application for alimony. No order for alimony shall be made until notice of the time and place of the hearing shall be served upon the opposite party.

History: En. Sec. 203, Civ. C. 1895; re-en. Sec. 3689, Rev. C. 1907; re-en. Sec. 5781, R. C. M. 1921; amd. Sec. 1, Ch. 136, L. 1945.

Collateral References
Divorce 214 (2), 239.
27B C.J.S. Divorce § 247.

21-150. Divorces granted by other jurisdictions—when not recognized. An ex parte divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force and effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced. Proof that a person obtaining an ex parte divorce from the bonds of matrimony in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced. Otherwise, the burden for impeaching the validity of a foreign divorce decree shall rest upon the assailant and prima facie validity shall be accorded to divorce decrees of sister states.

History: En. Sec. 1, Ch. 168, L. 1963.

NOTE.—Uniform State Law. Section 21-150 constitutes the "Uniform Divorce Recognition Act" approved by the National Conference of Commissioners on Uniform State Laws and the American

Bar Association in 1948 and adopted in substance in California, Louisiana, Nebraska, New Hampshire, North Dakota, Rhode Island, South Carolina, Washington and Wisconsin.

TITLE 22

DOWER

Chapter 1. Dower, 22-101 to 22-117.

Repealed

CHAPTER 1

DOWER

Section 22-101. Dower.

22-102. Mortgaged lands subject to dower.

22-103. Dower subject to purchase money. 22-104. Dower in surplus under mortgage.

22-105. Dower not to attach unless absolute title.

22-106. Absent wife need not sign deed.

22-107. Widow may elect.

22-108. Renunciation and form of.

22-109. Rights of widow when no issue.

22-110. Rights of widows when lands exchanged.

22-111. Widow's rights in land aliened.

22-112. Antenuptial settlement—when a bar to dower.

22-113. Assent to marriage settlement.

22-114. When dower may be assigned anew.

22-115. Endowed woman not to suffer waste.

22-116. Right to dower not affected by acts of husband.

22-117. Assignment of dower-by what regulated.

22-101. (5813) Dower. A widow shall be endowed of the third part of all lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form. When a wife joins with her husband in the execution of any conveyance of land, she thereby relinquishes her inchoate right, and shall not thereafter have dower therein, except that in case of sale under mortgage signed and executed by herself and husband she shall have a right of dower in the surplus. Equitable estates shall be subject to the widow's dower, and all real estate of every description, contracted for by the husband during his lifetime, the title to which may be completed after his decease.

History: En. Ch. 36, p. 38 et seq., L. 1866, March 21, 1866; this act set aside by act of Congress, March 2, 1867. This section en. Sec. 1, p. 63, L. 1876; omitted from Rev. Stat. 1879 and Comp. Stat. 1887; re-en. Sec. 228, Civ. C. 1895; re-en. Sec. 3708, Rev. C. 1907; re-en. Sec. 5813, R. C. M. 1921.

Cross-References

Assignment of dower, sec. 91-2601 et

Partition, sale of dower interest, sec. 93-6352.

Recovery of dower, time for commencing action, sec. 93-2504.

Sale or mortgage of dower of incompetent woman, secs. 91-4705, 91-4706.

Waiver by married woman, sec. 36-130.

Action for Dower

The duty of assigning the widow's dower rests upon those in possession of the husband's real estate, and if this be not done within a reasonable time after his death, she may sue such parties for its recovery and for damages to the extent of one-third the annual value of the profits of the

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land. Swartz v. Smole, 91 M 90, 94, 5 P 2d 566.

Where real property of a decedent was sold by his executor without regard to the widow's dower therein, she in an action against the purchaser to compel assignment of dower to her, was under section 91-2611, entitled to one-third of the rental value thereof from the date of demand therefore upon the purchaser. Swartz v. Smole, 91 M 90, 94, 5 P 2d 566.

Cannot Compel Wife To Release Dower

A court cannot compel a wife to release or convey her inchoate right of dower in lands her husband has agreed to sell by a contract to which she is not a party. Rosenow v. Miller, 63 M 451, 458, 207 P 618.

Construction of Borrowed Statutes

The dower statutes, being borrowed from Illinois, will receive the same construction by the Montana courts as previously given by the courts of Illinois. In re Roberts' Estate, 135 M 149, 338 P 2d 719, certiorari denied 361 U S 825, 4 L Ed 73, 80 S Ct 82.

Conveyances

An option given to purchase land is not a conveyance that will bar dower, if the offer to sell is not accepted until after the death of the husband. Tyler v. Tyler, 50 M 65, 73, 144 P 1090.

The term "conveyance," as used in this section, means a conveyance effective to transfer the title at the time it was made, and may not be construed to include one which has not become effective until after the rights of the widow have attached. Tyler v. Tyler, 50 M 65, 73, 144 P 1090.

Creditors Subordinate to Dower

The general rule is that the rights of the husband's creditors are subordinate to the widow's claim of dower, unless on debts constituting a special charge upon the land before coverture or at the time of its acquisition and as a part of the same transaction, and the insolvency of the husband's estate does not affect the widow's right of dower, unless otherwise provided by statute. Swartz v. Smole, 91 M 90, 94, 5 P 2d 566.

Dower May Be Relinquished

The statutory methods enumerated in this section and in sections 22-107, 22-109 and 22-112, in which a widow's right to dower may be relinquished, are not exclusive, but an antenuptial contract releasing her dower interest in her intended husband's property is binding upon her as widow, provided it is free from fraud or misrepresentation, reasonable in its pro-

visions, and entered into by both parties in good faith. Hannon v. Hannon, 46 M 253, 259, 127 P 466.

Election as to Claim of Dower

The wife's right to dower or election under this section and section 22-109 are separate from her rights as an heir of her husband under section 91-403, and her participation in the distribution of the estate as an heir of her husband does not constitute a waiver of the right of election to take one-half of the residue after payment of debts. Dahlman v. Dahlman, 28 M 373, 377, 72 P 748. See Hannon v. Hannon, 46 M 253, 257, 127 P 466.

Encumbrance on Husband's Title

The lien of a judgment against a husband is subject to the interest of his wife, whether arising from a tenancy in common with her husband or out of her right of dower. Manuel v. Turner, 36 M 512, 519, 93 P 808.

A wife's inchoate right of dower, whether treated as a bare expectancy or as a contingent interest, is such a valuable right or interest as constitutes an encumbrance on her husband's title. Rosenow v. Miller, 63 M 451, 458, 207 P 618.

Favored by Law

The right of dower, by which provision is made for the support of the widow out of the lands of her husband and which, inchoate during the life of the latter, becomes complete upon his death, is protected jealously by the law. Mathews v. Marsden, 71 M 502, 507, 230 P 775.

Unpatented Mining Claim

A widow has a dower interest in an unpatented mining claim possessed by her husband at the time of his death. Clark v. Clark, 126 M 9, 242 P 2d 992, 993, 994.

Value of Dower

In view of the code provisions relative to the right of dower depending upon eventualities which cannot be foreseen, it is impossible to place a valuation upon a widow's right in advance of her husband's death, and therefore plaintiff in an action for specific performance of a land contract to which the vendor's wife was not a party, requiring defendant to convey all his right, title and interest in the premises for the agreed price less the determined value of his wife's dower right, cannot claim abatement from the contract price. Rosenow v. Miller, 63 M 451, 458, 207 P 618

Widow Defined

The word "widow" means "a woman who has lost her husband by death," and does not apply to divorced persons.

O'Malley v. O'Malley, 46 M 549, 557, 129

References

In re McLure's Estate, 63 M 536, 539, 10, 22, 254 P 875; Shepherd & Pierson Co. v. Baker, 81 M 185, 192, 262 P 887; Emery v. Emery, 122 M 201, 200 P 2d 251, 263; Purcell v. Gibbs, 133 M 481, 326 P 2d 679.

Collateral References

Dower = 1-19, 49. 28 C.J.S. Dower §§ 42 et seq., 65. 25 Am. Jur. 2d 83, Dower, § 3.

Dower right as passing by quitclaim deed. 44 ALR 1275 and 162 ALR 556.

Misconduct of surviving spouse as affecting marital rights in other's estate. 71 ALR 277 and 139 ALR 486.

Right to dower under separation agreement invalid as contrary to public policy. 109 ALR 1178.

Alien widow's right to dower. 110 ALR 520

Right of widow of an heir to dower, where heir dies before decedent's estate is closed. 23 ALR 2d 961.

Corporate entity: Dower rights of stockholder's spouse in real property of corporation. 32 ALR 2d 705.

Separation agreement as barring dower right. 34 ALR 2d 1043.

Solid mineral royalty as real or personal property for purposes of inheritance. 68 ALR 2d 732.

22-102. (5814) Mortgaged lands subject to dower. When a person seized of an estate of inheritance in land shall have executed a mortgage of such estate before or after marriage, his widow shall nevertheless be entitled to dower out of the lands mortgaged, as against every person except the mortgagee and those claiming under him.

History: En. Ch. 36, p. 38 et seq., L. 1866, March 21, 1866; this act set aside by act of Congress, March 2, 1867. This section en. Sec. 2, p. 63, L. 1876; omitted from Rev. Stat. 1879 and Comp. Stat. 1887; re-en. Sec. 229, Civ. C. 1895; re-en. Sec. 3709, Rev. C. 1907; re-en. Sec. 5814, R. C. M. 1921.

Collateral References

Dower 25, 44. 28 C.J.S. Dower §§ 39, 60. 25 Am. Jur. 2d 121, Dower, § 55.

22-103. (5815) Dower subject to purchase money. When a husband shall purchase lands during coverture, and shall mortgage such lands to secure the payment of the purchase money thereof, his widow shall not be entitled to dower out of such lands as against the mortgagee, or those claiming under him, although she shall not have united in such mortgage; but she shall be entitled to dower as against all other persons.

History: En. Ch. 36, p. 38 et seq., L. 1866, March 21, 1866; this act set aside by act of Congress, March 2, 1867. This section en. Sec. 3, p. 63, L. 1876; omitted from Rev. Stat. 1879 and Comp. Stat. 1887; re-en. Sec. 230, Civ. C. 1895; re-en. Sec. 3710, Rev. C. 1907; re-en. Sec. 5815, R. C. M. 1921.

Collateral References

Dower \$\sim 26. 28 C.J.S. Dower § 36.

(5816) Dower in surplus under mortgage. When, in the cases specified in the two preceding sections, the mortgagee, or those claiming under him, shall, after the death of such husband, cause the land mortgaged to be sold, either under a power contained in the mortgage or by virtue of a judgment or decree of a court, and any surplus shall remain after the payment of the moneys due on such mortgage and the costs and charges of sale, such widow shall be entitled to the interest or income of one-third part of such surplus for life as her dower.

History: En. Ch. 36, p. 38 et seq., L. 1866, March 21, 1866; this act set aside by act of Congress, March 2, 1867. This section en. Sec. 4, p. 64, L. 1876; omitted from Rev. Stat. 1879 and Comp. Stat. 1887; re-en. Sec. 231, Civ. C. 1895; re-en. Sec.

3711, Rev. C. 1907; re-en. Sec. 5816, R. C. M. 1921.

Collateral References

Dower 15. 28 C.J.S. Dower § 30. DOWER 22-107

22-105. (5817) **Dower not to attach unless absolute title**. A widow shall not be endowed of lands conveyed to her husband by way of mortgage, unless he shall have acquired an absolute estate during the marriage.

History: En. Ch. 36, p. 38 et seq., L. 1866, March 21, 1866; this act set aside by act of Congress, March 2, 1867. This section en. Sec. 5, p. 64, L. 1876; omitted from Rev. Stat. 1879 and Comp. Stat. 1887; re-en. Sec. 232, Civ. C. 1895; re-en. Sec. 3712, Rev. C. 1907; re-en. Sec. 5817, R. C. M. 1921.

Collateral References

Dower \$7. 28 C.J.S. Dower \$ 10. 25 Am. Jur. 2d 105, Dower, \$28.

Dower or curtesy in estates of inheritance subject to condition, defeasance, termination, or expiration. 25 ALR 2d 333.

22-106. (5818) Absent wife need not sign deed. Any married man residing and owning real property in the state, whose wife has never been in the state or territory of Montana, can by deed, mortgage, or other conveyance, grant the full title to such property by his own signature, and the wife or widow shall have no dower interest in the property to which the title of the husband is so divested.

History: En. Ch. 36, p. 38 et seq., L. 1866, March 21, 1866; this act set aside by act of Congress, March 2, 1867. This section en. Sec. 6, p. 64, L. 1876; omitted from Rev. Stat. 1879 and Comp. Stat. 1887; re-en. Sec. 233, Civ. C. 1895; re-en. Sec. 3713, Rev. C. 1907; re-en. Sec. 5818, R. C. M. 1921.

"So Divested" Means by Deed, Not by Distribution under Law of Succession

Under this section, the term "so divested" means divestiture by deed and not by operation of law as where the husband

dies intestate and the property is distributed to the heirs under the law of succession. Mathey v. Mathey, 109 M 467, 474, 98 P 2d 373.

References

Rosenow v. Miller, 63 M 451, 458, 207 P 618; In re Metcalf's Estate, 93 M 542, 548, 19 P 2d 905.

Collateral References

Dower 344. 28 C.J.S. Dower 860.

22-107. (5819) Widow may elect. Every devise or bequest to her by her husband's will shall bar a widow's dower in his lands and her share in his personal estate unless otherwise expressed in the will; but she may elect whether she will take under the provisions for her in the will of her deceased husband or will renounce the benefit of such provisions for her, and take her dower in the lands and her share in the personal estate under the succession statutes, as if there had been no will, but not in excess of two-thirds (2/3) of the husband's net estate, real and personal, after the payment of creditors' claims, expenses of administration and any and all taxes, including state and federal inheritance and estate taxes.

History: En. Ch. 36, p. 38 et seq., L. 1866, March 21, 1866; this act set aside by act of Congress, March 2, 1867. This section en. Sec. 7, p. 65, L. 1876; omitted from Rev. Stat. 1879 and Comp. Stat. 1887; re-en. Sec. 234, Civ. C. 1895; re-en. Sec. 3714, Rev. C. 1907; re-en. Sec. 5819, R. C. M. 1921; amd. Sec. 1, Ch. 231, L. 1955.

Apportionment of Federal Estate Taxes

In the absence of other provisions by the testator the cost of federal estate taxes will be equitably allocated between probate and nonprobate taxable property of the decedent's estate. In re Marans' Estate, 143 M 388, 390 P 2d 443.

Debts against Estate of Husband

The existence of debts against the estate of her deceased husband which cannot be satisfied from the personal property of the estate does not affect the dower right of the widow. Swartz v. Smole, 91 M 90, 5 P 2d 566.

Effect of Renunciation

Where the testator left a will and his estate consisted entirely of personal property, the widow, as sole survivor, could not defeat the legacies contained therein and create an intestacy by renouncing under the provisions of this section. In re Roberts' Estate, 135 M 149, 338 P 2d

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719, certiorari denied 361 U S 825, 4 L Ed 73, 80 S Ct 82.

Nonprobate Assets

This section does not intend to include federal estate taxes on nonprobate assets where the widow elects to take against the will. In re Marans' Estate, 143 M 388, 390 P 2d 443.

Renouncing Benefits under Will

Where the widow has taken lands devised to her under the provisions of a will, she is barred from claiming dower unless within one year after the probate of the will, she elects to renounce such devise and take her dower therein. Chadwick v. Tatem, 9 M 354, 368, 23 P 729, appeal dismissed 145 U S 655, 36 L Ed 852, 12 S Ct 988.

Under this section the widow is required to renounce benefits under will and elect to take her dower interest, only when the will contains a devise or bequest to her. Swartz v. Smole, 91 M 90, 5 P 2d 566

Where a widow though not mentioned in her husband's will nevertheless renounced any benefits thereunder and otherwise made it plain that she would insist on her dower right in the real property of the estate, she may not be said to have been estopped merely because

she accepted a sum of money due her as family allowance, a portion of which to her knowledge was derived from the sale of the realty. Swartz v. Smole, 91 M 90, 5 P 2d 566.

References

Dahlman v. Dahlman, 28 M 373, 377, 72 P 748; In re Beck's Estate, 44 M 561, 569, 121 P 784; Hannon v. Hannon, 46 M 253, 256, 127 P 466; Rosenow v. Miller, 63 M 451, 459, 207 P 618; In re McLure's Estate, 63 M 536, 539, 208 P 900; Mathews v. Marsden, 71 M 502, 508, 230 P 775; In re Mahaffay's Estate, 79 M 10, 22, 254 P 875.

Collateral References

Wills 778-786.

778-786.

109 C.J.S. Wills § 1256.

25 Am. Jur. 2d 201, Dower, § 155.

When is widow put to her election between provision made for her by her husband's will, and her dower, homestead, or community right. 22 ALR 437; 68 ALR 507 and 171 ALR 649.

What amounts to widow's election as between antenuptial or postnuptial settlement and husband's will or her rights under statute of descent and distribution, or attack by her upon such settlement. 117 ALR 1001.

22-108. (5820) Renunciation and form of. When a woman is entitled to an election under this chapter, she shall be deemed to have taken such devise, unless, within one year after the authentication or probate of the will, she shall deliver or transmit to the district court of the proper county a written renunciation, which may be in the following form, to wit: "I, A B, widow of C D, late of the county of, state of Montana, do hereby renounce and quit all claims to the benefit of any bequest or devise made to me by the last will and testament of my said deceased husband, which has been exhibited and proved according to law (or otherwise, as the case may be), and I do elect to take in lieu thereof my dower, or legal share of the estate of my said husband," which said letter of renunciation shall be filed in the office of the clerk of the district court, and shall operate as a complete bar against any claim which such widow may afterwards set up to any provision which may have been thus made for her in the will of any testator, in lieu of dower; and by thus renouncing all claims as aforesaid, such widow shall thereupon be entitled to dower in the lands or share in the personal estate of her husband.

History: En. Ch. 36, p. 38 et seq., L. 1866, March 21, 1866; this act set aside by act of Congress, March 2, 1867. This section en. Sec. 8, p. 65, L. 1876; omitted from Rev. Stat. 1879 and Comp. Stat. 1887; re-en. Sec. 235, Civ. C. 1895; re-en. Sec. 3715, Rev. C. 1907; re-en. Sec. 5820, R. C. M. 1921.

References

In re McLure's Estate, 63 M 536, 539, 208 P 900; In re Roberts' Estate, 135 M 149, 338 P 2d 719, 720, certiorari denied 361 U S 825, 4 L Ed 73, 80 S Ct 82.

Collateral References Wills 793. 97 C.J.S. Wills § 1268. DOWER 22-109

22-109. (5821) Rights of widow when no issue. If a husband die, leaving a widow, but no children, nor descendants of children, such widow may, if she elect, have, in lieu of her dower in the estate of which her husband died seized, whether the same shall have been assigned or not, absolute and in her own right, as if she were sole, one-half of all the real estate which shall remain after the payment of all just debts and claims against the deceased husband; provided, that, in case dower in such estate shall have been already assigned, she shall make such new election within two months after being notified of the payment of such claims and debts.

History: En. Ch. 36, p. 38 et seq., I. 1866, March 21, 1866; this act set aside by act of Congress, March 2, 1867. This section en. Sec. 9, p. 65, L. 1876; omitted from Rev. Stat. 1879 and Comp. Stat. 1887; re-en. Sec. 236, Civ. C. 1895; re-en. Sec. 3716, Rev. C. 1907; re-en. Sec. 5821, R. C. M. 1921.

Construction and Application

The right granted to the widow by this section is absolute, and wholly independent of her right to participate in the distribution of the estate as heir of her husband; it attaches to all lands in which she is entitled to dower, as provided in section 22-101. Dahlman v. Dahlman, 28 M 373, 377, 72 P 748; Tyler v. Tyler, 50 M 65, 70, 144 P 1090.

The wife's right to dower or election under section 22-101 and this section are separate from her rights as an heir of her husband under section 91-403 and her participation in the distribution of the estate as an heir of her husband does not constitute a waiver of the right of election to take one-half of the residue after payment of debts. Dahlman v. Dahlman, 28 M 373, 377, 72 P 748.

The district court, when exercising its probate jurisdiction, has no power with reference to dower, and no order which it may make touching the distribution of property during the course of administration can, of itself, affect the right of dower of a widow in any lands to which the right has attached, or any election which the widow has with reference to it. She may bring her action to have her dower allotted to her, notwithstanding the order of distribution makes no mention of her right. In re Dahlman's Estate, 28 M 379, 380, 72 P 750.

Effect of an Option on Dower

Where a wife joined her husband in an option contract on land owned by the latter, executing and depositing a deed in escrow, and the husband died before the holders of the option exercised their right and received the deed from the depositary, the widow was entitled to one-half of the net proceeds of such sale, in lieu of dower, her right to claim one-half of the real estate of her husband, granted by this

section, having attached before the deed became effective to divest deceased of title. Tyler v. Tyler, 50 M 65, 73, 144 P 1090.

Effect of Remarriage

The remarriage of a widow did not deprive her of the right to elect to take a one-half interest in the estate of her deceased husband, under this section, in lieu of dower granted by section 22-101, the word "widow" as used in those sections referring to the person and not to her then state or condition. Mathews v. Marsden, 71 M 502, 504, 230 P 775.

Mortgagor Who Failed To File Claim Not Affected by Election

The bar to an election by a widow to take in lieu of dower under this section until all just debts and claims against the deceased husband are paid is for the protection of creditors; therefore where a mortgage creditor fails to file a claim against the estate he is not injured by such election since the land selected in lieu of dower is still impressed with all outstanding liens against it, and the reason for the rule ceased. Mathey v. Mathey, 109 M 467, 474, 98 P 2d 373.

Probate Court Has No Power over Dower—Decree of Distribution Cannot Affect Right or Election

The district court sitting in probate has no power with reference to dower and no order which it may make touching distribution of estate property during the course of administration can of itself affect the right of dower in lands to which the right has attached or any election of the widow with reference to it, and she may bring action to allot her dower notwithstanding the order of distribution makes no mention of her right, and subsequent conveyance of her distributive share is not a bar to election to take in lieu of dower in other lands of the deceased. Mathey v. Mathey, 109 M 467, 476, 98 P 2d 373.

What Are Just Debts

Administrator's fees, attorney's fees and taxes on the estate for the current year remaining unpaid are not "just debts and claims against the deceased husband,"

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within the meaning of this section which must be paid before the widow is entitled to have one-half of the real property of which the husband died seized, set aside to her in lieu of dower. Mathews v. Marsden, 71 M 502, 504, 230 P 775.

Widow's Conveyance of Her Distributive Share of Husband's Estate, Not Relinquishment of Dower in Shares Distributed to Others

The widow's rights as heir and her dower right are separate and distinct; she is entitled to both, and by conveying her distributive share in the estate of her deceased husband she does not thereby relinquish her dower right in the shares of the estate received by other heirs. Mathey v. Mathey, 109 M 467, 475, 98 P 2d 373.

Widow's Right to Dower Held Ripened Rule of Property

While in some instances construction of this section relating to dower as declared in Dahlman v. Dahlman, 28 M 373, 72 P 748, respecting the right of the widow to assert her claim despite the rights of creditors, heirs or any persons whomsoever, may render real estate titles uncertain, it has been a rule of property in the state for more than 35 years, and must stand until modified by the legislature. Mathey v. Mathey, 109 M 467, 476, 98 P 2d 373.

References

In re Beck's Estate, 44 M 561, 569, 121 P 784; Hannon v. Hannon, 46 M 253, 257, 127 P 466; Rosenow v. Miller, 63 M 451, 459, 207 P 618; In re Mahaffay's Estate, 79 M 10, 23, 254 P 875; Swartz v. Smole, 91 M 90, 95, 5 P 2d 566; Harrison v. Cannon, 122 M 318, 203 P 2d 978.

Collateral References

Descent and Distribution 25-67; Dower 24.

26A C.J.S. Descent and Distribution §§ 48-60; 28 C.J.S. Dower § 5.

22-110. (5822) Rights of widows when lands exchanged. If a husband, seized of an estate of inheritance in lands, exchanges it for other lands, his widow shall not have dower of both, but shall make her election as hereinbefore provided, to be endowed of the lands given, or of those taken in exchange. And if such election be not evinced by the commencement of the proceedings for the recovery and assignment of her dower of the lands given in exchange within one year after the death of her husband, she shall be deemed to have elected to take her dower of the lands taken in exchange.

History: En. Ch. 36, p. 38 et seq., L. 1866, March 21, 1866; this act set aside by act of Congress, March 2, 1867. This section en. Sec. 9, p. 65, L. 1876; omitted from Rev. Stat. 1879 and Comp. Stat. 1887; re-en. Sec. 237, Civ. C. 1895; re-en. Sec.

3717, Rev. C. 1907; re-en. Sec. 5822, R. C. M. 1921.

Collateral References

Dower \$ 44. 28 C.J.S. Dower § 60. 25 Am. Jur. 2d 121, Dower, § 54.

22-111. (5823) Widow's rights in land aliened. When a widow is entitled to dower out of any lands aliened by her husband in his lifetime, and such lands have been enhanced in value after the alienation, such lands shall be estimated in setting out the widow's dower according to their value at the time when they were so aliened.

History: En. Sec. 18, p. 68, L. 1876; re-en. Sec. 238, Civ. C. 1895; re-en. Sec. 3718, Rev. C. 1907; re-en. Sec. 5823, R. C. M. 1921.

Collateral References Dower©=86. 28 C.J.S. Dower § 98.

22-112. (5824) Antenuptial settlement—when a bar to dower. A woman may be barred of her dower in all of the land of her husband by a jointure settled on her with her assent before the marriage; provided, such jointure consists of a freehold estate in lands for the life of the wife, at least, to take effect in possession or profits immediate on the death of the husband.

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History: En. Sec. 19, p. 68, L. 1876; re-en. Sec. 239, Civ. C. 1895; re-en. Sec. 3719, Rev. C. 1907; re-en. Sec. 5824, R. C. M. 1921.

References

Dahlman v. Dahlman, 28 M 373, 377, 72 P 748; Hannon v. Hannon, 46 M 253,

257, 127 P 466; Mathews v. Marsden, 71 M 502, 509, 230 P 775.

Collateral References

Dower \$ 41. 28 C.J.S. Dower \$ 55. 25 Am. Jur. 2d 175, Dower, \$ 118.

22-113. (5825) Assent to marriage settlement. Such assent shall be expressed if the woman is full age by her becoming a party to the conveyance by which it is settled, and if she is under age, by her joining with her father or guardian in such conveyance.

History: En. Sec. 20, p. 68, L. 1876; re-en. Sec. 240, Civ. C. 1895; re-en. Sec. 3720, Rev. C. 1907; re-en. Sec. 5825, R. C. M. 1921.

References

Dahlman v. Dahlman, 28 M 373, 377, 72 P 748; Hannon v. Hannon, 46 M 253, 257, 127 P 466; Mathews v. Marsden, 71 M 502, 509, 230 P 775.

22-114. (5826) When dower may be assigned anew. If a woman is lawfully evicted of lands assigned to her as a dower or settled upon the jointure, or is deprived of the provisions made for her by will or otherwise, in lieu of dower, she may be endowed anew in like manner as if such assignment, jointure, or other provision had not been made.

History: En. Sec. 21, p. 68, L. 1876; re-en. Sec. 241, Civ. C. 1895; re-en. Sec. 3721, Rev. C. 1907; re-en. Sec. 5826, R. C. M. 1921.

Collateral References
Dower = 112-115.
28 C.J.S. Dower §§ 81, 110, 111.

22-115. (5827) Endowed woman not to suffer waste. No woman endowed of any lands shall commit or suffer waste on the same; but she shall maintain the houses and tenements with the fences and appurtenances in good repair, and shall be liable to the person having the next immediate estate of inheritance therein for all damages occasioned by any waste committed or suffered by her.

History: En. Sec. 22, p. 68, L. 1876; 3722, Rev. C. 1907; re-en. Sec. 5827, R. C. re-en. Sec. 242, Civ. C. 1895; re-en. Sec. M. 1921.

22-116. (5828) Right to dower not affected by acts of husband. No act, deed, or conveyance, executed or performed by the husband, without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the estates of married women, and no judgment or decree confessed by or recovered against him, and no laches, default, covin, or crime of the husband, shall prejudice the rights of the wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto.

History: En. Sec. 243, Civ. C. 1895; re-en. Sec. 3723, Rev. C. 1907; re-en. Sec. 5828, R. C. M. 1921.

Acknowledgment of Mortgage

The defense to a suit to foreclose a mortgage on realty that the instrument had not been acknowledged by the wife of the mortgagor is a privilege personal to the wife, which she may waive; it may not be interposed by another for her where

her dower right is not in question. Angus v. Mariner, 85 M 365, 372, 278 P 996.

Contract of Sale

Where the wife of a vendor did not sign the contract of sale sought to be specifically enforced she could not be divested of her inchoate right of dower by the decree granting the relief. Shaw v. McNamara & Marlow, Inc., 85 M 389, 397, 278 P 836.

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Where vendor's wife did not sign a contract for deed, and there was no evidence that she intended to join in a deed conforming to the contract for deed, no action would lie against her for reformation of the deed to conform to the contract. Schillinger v. Huber, 133 M 80, 320 P 2d 346, 350.

Sale by Executor

A sale of real property of a decedent by

an executor is inoperative so far as the widow's dower is concerned, and the purchaser takes title subject to her dower right which must be assigned against the purchaser. Swartz v. Smole, 91 M 90, 96, 5 P 2d 566.

Collateral References Dower©=38-48. 28 C.J.S. Dower § 57 et seq.

22-117. (5829) Assignment of dower—by what regulated. The procedure for assignment of dower upon the death of the husband is regulated by the provisions of sections 91-2601 to 91-2612.

History: New section recommended by Code Commissioner 1921.

Collateral References
Dower 66.
28 C.J.S. Dower §§ 79, 83.

TITLE 23

ELECTIONS

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CHAPTER 1

TIME OF HOLDING ELECTIONS-PROCLAMATIONS

General elections, when to be held. Section 23-101.

23-102. Special elections—purpose and calling.

Election proclamations by the governor. 23-103.

23-104.

Governor's proclamation, contents. Publication and posting by county commissioners.

23-106. Election proclamation by county commissioners.

23-101. (531) General elections, when to be held. There must be held throughout the state, on the first Tuesday after the first Monday of November, in the year eighteen hundred and ninety-four, and in every second year thereafter, an election to be known as the general election.

History: En. Sec. 1150, Pol. C. 1895; re-en. Sec. 450, Rev. C. 1907; re-en. Sec. 531, R. C. M. 1921. Cal. Pol. C. Sec. 1041.

Election law violations, sec. 94-1401 et

Initiative and referendum, sec. 37-101 et seq.

Cross-References

Cities and towns, elections of officers, secs. 11-701 to 11-734.

Corrupt Practices Act, secs. 94-1427 to 94-1474.

Definition

A general election is one held for the election of officers throughout the state. ELECTIONS

State ex rel. Rowe v. Kehoe, 49 M 582, 591, 144 P 162.

References

State ex rel. Patterson v. Lentz, 50 M 322, 338, 146 P 932; Mulholland v. Ayers, 109 M 558, 562, 99 P 2d 234; Maddox v. Board of State Canvassers, 116 M 217, 223,

149 P 2d 112; LaBorde v. McGrath, 116 M 283, 287, 149 P 2d 913; Pioneer Motors, Inc. v. State Highway Commission, 118 M 333, 165 P 2d 796, 800.

Collateral References

Elections 38. 29 C.J.S. Elections § 77.

23-102. (532) Special elections—purpose and calling. Special elections are such as are held to supply vacancies in any office, and are held at such times as may be designated by the proper officer or authority. The board of county commissioners shall be authorized to call a special election at any time for the purpose of submitting to the qualified electors of the county a proposition to raise money for any public improvement desired to be made in the county.

History: En. Sec. 1151, Pol. C. 1895; amd. Sec. 451, Rev. C. 1907; re-en. Sec. 532, R. C. M. 1921, Cal. Pol. C. Sec. 1043.

Cross-References

Airport bonds, sec. 1-804.

Beer, local option elections, sec. 4-350 et seg.

Cities and towns, bond elections, secs. 11-2301 to 11-2330.

County bonds and warrants, secs. 16-2001 to 16-2050.

Local option elections, state liquor control act, sec. 4-142 et seq.

Retail liquor licenses, local option elec-

tion, secs. 4-431 to 4-437.

School bonds, secs. 75-3901 to 75-3944, 75-4112, 75-4113, 75-4115 to 75-4118, 75-4601 to 75-4606.

School taxation, secs. 75-3801 to 75-3805.

Definition

A special election is one held to supply a vacancy in a public office, or one in which is submitted to the electors a proposition to raise money for any public

improvement. State ex rel. Rowe v. Kehoe, 49 M 582, 591, 144 P 162.

"Vacancy"

The word vacancy as applied to a public office has no technical meaning, and it is not to be taken in a strict technical sense in every case. It may be said that an office is vacant when it is empty and without an incumbent who has a right to exercise its functions and take its fees or emoluments even though the vacancy is not a corporal one. "An office without an incumbent is vacant." LaBorde v. McGrath, 116 M 283, 292, 149 P 2d 913.

References

State ex rel. Patterson v. Lentz, 50 M 322, 338, 146 P 932; Mulholland v. Ayers, 109 M 558, 562, 99 P 2d 234; Bottomly v. Ford, 117 M 160, 163, 157 P 2d 108.

Collateral References

Counties 526; 29 C.J.S. Elections 66.

23-103. (533) Election proclamations by the governor. At least sixty days before a general election, and whenever he orders a special election to fill a vacancy in the office of state senator or member of the house of representatives, at least ten days before such special election, the governor must issue an election proclamation, under his hand and the great seal of the state, and transmit copies thereof to the boards of commissioners of the counties in which such elections are to be held.

History: En. Sec. 1160, Pol. C. 1895; re-en. Sec. 452, Rev. C. 1907; re-en. Sec. 533, R. C. M. 1921. Cal. Pol. C. Sec. 1053.

Application of Section

As this section does not impose upon the governor the duty to call an election to fill vacancies other than those in the offices of state senator and member of the house of representatives, and he is not presumed to know what, if any, vacancy exists in any local county office, apparently proclamation by the governor is necessary only when an election is to be held to fill offices for the next regular term, except to fill vacancies in the two offices of state senator and member of the house of representatives. State ex rel. Rowe v. Kehoe, 49 M 582, 591, 144 P 162.

Calling of Special Election by Board of County Commissioners

While the provisions of the codes relating to the manner of calling special elec-

tions are crude and not in the most appropriate terms to confer the necessary powers upon boards of county commissioners, they are nevertheless sufficient for this purpose. State ex rel. Patterson v. Lentz, 50 M 322, 343, 146 P 932.

Notice of General Election

The governor issued his proclamation giving notice of a general election to be held November 8, 1904, under this section and section 23-104, and omitted therefrom the mention of an election of three judges for the second judicial district, and called for the election of two judges. Upon mandamus proceedings against the governor the relator claimed that three judges should have been mentioned in the proclamation, and that he was elected and entitled to receive from the governor a commission as judge. As it failed to appear that the electors voted for more than two candidates for judgeships, the petition was dismissed. State ex rel. Breen v. Toole, 32 M 4, 8, 79 P 403.

A statement in the proclamation of the governor giving notice of a general election, that among other officers there was to be elected "also a district judge, in any

judicial district where a vacancy may exist," was not such a notice of the necessity of filling a vacancy by election as required by this section. State ex rel. Patterson v. Lentz, 50 M 322, 343, 146 P 932.

The governor's proclamation should state the offices to be filled, especially where a state office, such as a judgeship, held by his appointee, is to be filled; but, if the people have actual notice that a judge is to be elected and indicate their choice, no insufficiency of notice, in the governor's proclamation, of a vacancy in that office, in any particular district, or other informality in the election, will suffice to defeat their will, as expressed by their votes. State ex rel. Patterson v. Lentz, 50 M 322, 343, 146 P 932.

References

State ex rel. Wulf v. McGrath, 111 M 96, 100, 106 P 2d 183; State ex rel. Grant v. Eaton, 114 M 199, 209, 133 P 2d 588; Herweg v. Thirty Ninth Legislative Assembly of State of Montana, 246 F Supp 454.

Collateral References

Elections 40. 29 C.J.S. Elections § 72.

23-104. (534) Governor's proclamation, contents. Such proclamation must contain:

- 1. A statement of the time of election, and the offices to be filled.
- 2. An offer of rewards in the following form: "And I do hereby offer a reward of one hundred dollars for the arrest and conviction of any person violating any of the provisions of sections 94-1401 to 94-1426. Such rewards to be paid until the total amount hereafter expended for the purpose reaches the sum of five thousand dollars."

History: En. Sec. 1161, Pol. C. 1895; re-en. Sec. 453, Rev. C. 1907; re-en. Sec. 534, R. C. M. 1921. Cal. Pol. C. Sec. 1054.

References

State ex rel. Breen v. Toole, 32 M 4, 8, 79 P 403; State ex rel. Rowe v. Kehoe, 49 M 582, 591, 144 P 162; State ex rel. Patterson v. Lentz, 50 M 322, 343, 146 P 932;

Nordquist v. Ford, 112 M 278, 283, 114 P 2d 1071; Herweg v. Thirty Ninth Legislative Assembly of State of Montana, 246 F Supp 454.

Collateral References

Elections 41.
29 C.J.S. Election § 73.

23-105. (535) Publication and posting by county commissioners. The board of county commissioners, upon the receipt of such proclamation, may, in the case of general or special elections, cause a copy of the same to be published in some newspaper printed in the county, if any, and to be posted at each place of election at least ten days before the election; and in case of special elections to fill a vacancy in the office of state senator or member of the house of representatives, the board of county commissioners, upon receipt of such proclamation, may in their discretion, cause a copy of the same to be published or posted as hereinbefore provided, except that such publication or posting need not be made for a longer period than five days before such election.

History: En. Sec. 1162, Pol. C. 1895; re-en. Sec. 454, Rev. C. 1907; re-en. Sec. 535, R. C. M. 1921, Cal. Pol. C. Sec. 1055.

Inapplicable to Measures Put to People by Legislature

Contention that because of failure to have the governor's proclamation that Ch. 168, Laws 1939 (omitted), would be submitted to the electors at the general election of 1940 published in newspapers as required by this section and section 37-104, the act is invalid, was not meritorious, these sections applying only to measures put before the people by their own petition, and not by the legislature, and no

tice amply met by distribution of copies of the law. Nordquist v. Ford, 112 M 278, 283, 114 P 2d 1071.

References

State ex rel. Rowe v. Kehoe, 49 M 582, 591, 144 P 162; State ex rel. Cryderman v. Wienrich, 54 M 390, 170 P 942; State ex rel. Freeze v. Taylor, 90 M 439, 444, 4 P 2d 479; State ex rel. Wulf v. McGrath, 111 M 96, 100, 106 P 2d 183.

Collateral References

Elections \$2. 29 C.J.S. Elections \$74.

23-106. (536) Election proclamation by county commissioners. Whenever a special election is ordered by the board of county commissioners, they must issue an election proclamation, containing the statement provided for in subdivision one of section 23-104, and must publish and post it in the same manner as proclamations issued by the governor.

History: En. Sec. 1163, Pol. C. 1895; re-en. Sec. 455, Rev. C. 1907; re-en. Sec. 536, R. C. M. 1921. Cal. Pol. C. Sec. 1056.

Application of Section

This section has no reference to elections held for raising money for public improvements. The power conferred in this behalf is exercised under special provisions on the subject, found in that part of the codes relating to county government. State ex rel. Rowe v. Kehoe, 49 M 582, 592, 144 P 162.

Notice of Election

The notice of election does not take the place of the election proclamation. Evers v. Hudson, 36 M 135, 154, 92 P 462.

Special Election To Fill Vacancies

In case of vacancies in county offices, boards of county commissioners have the power, and it is their duty to call and provide for the holding of special elections to fill them. State ex rel. Rowe v. Kehoe, 49 M 582, 592, 144 P 162.

References

State ex rel. Patterson v. Lentz, 50 M 322, 343, 146 P 932; State ex rel. Cryderman v. Wienrich, 54 M 390, 399, 170 P 942.

Collateral References

Elections \$\infty 40-42. 29 C.J.S. Elections \$\ 72-74.

CHAPTER 2

PUBLICATION OF QUESTIONS SUBMITTED TO POPULAR VOTE

Section 23-201. Publication and printing of amendments to constitution. 23-202. Advertisement of questions to be submitted.

23-201. (537.1) Publication and printing of amendments to constitution. Whenever a proposed constitutional amendment or amendments are submitted to the people of the state for popular vote, the secretary of state shall cause the said proposed amendment or amendments to be published in full once a week in one newspaper in each county of the state, if such there be, for three (3) months previous to the next general election for members of the legislative assembly. Such publication shall not be had in more than one paper in any one county in the state.

The secretary of state shall also cause to be printed a pamphlet containing a true and exact copy of the proposed amendment or amendments, and a true and exact copy of the existing constitutional provisions if the proposed constitutional amendment or amendments is or are a revision of

an existing amendment or amendments, and the amendment or amendments in the form in which it or they will be printed on the official ballot. The said proposed amendment or amendments, printed as herein provided, shall then be distributed as provided in section 37-107. The cost of publication of said amendment or amendments, and the cost of printing said pamphlet or pamphlets shall be a proper charge against the state at the rate, as provided for in the statutes for state printing.

History: En. Sec. 1, Ch. 62, L. 1927; amd. Sec. 1, Ch. 104, L. 1945.

Cross-Reference

Explanation of initiative, referendum and constitutional measures to be prepared by attorney general, sec. 37-104.1.

Operation and Effect

Legislature, by repealing section 537, R. C. M. 1935 and leaving in effect this section requiring publication of proposed constitutional amendments, indicated its intent to disperse with publication prior to general election of legislative acts re-ferred to the people by the legislature, or the governor's proclamation that such act would be voted upon at such election. Nordquist v. Ford, 112 M 278, 283, 114 P 2d 1071.

Collateral References Constitutional Law 9 (1). 16 C.J.S. Constitutional Law § 10.

(538) Advertisement of questions to be submitted. Questions to be submitted to the people of the county or municipality must be advertised by publication in at least one newspaper within the county or municipality, once a week for two successive weeks, and one of such publications in such newspaper must be upon the last day upon which such newspaper is issued before the election.

History: En. Sec. 1, Ch. 130, L. 1919; re-en. Sec. 538, R. C. M. 1921.

State ex rel. Wulf v. McGrath, 111 M 96, 100, 106 P 2d 183.

Collateral References Elections 40 et seq.

29 C.J.S. Elections § 71 et seg.

CHAPTER 3

QUALIFICATIONS AND PRIVILEGES OF ELECTORS

Section 23-301. Elections to be by ballot.

23-302. Qualifications of voter.

23-303. Qualifications of electors at elections on incurring state indebtedness.
23-304. Lists and precinct registers.
23-305. Duties of secretary of state and county clerks.
23-306. Repealing clause—exception.

23-307. Qualification of electors on elections concerning state tax levy or debt.

Privilege from arrest. 23-308.

23-309. Exempt from military duty on election day.
23-310. Idiot or insane.
23-311. Who are taxpayers.

23-301. (539) Elections to be by ballot. All elections by the people shall be by ballot.

History: En. Sec. 1180, Pol. C. 1895; re-en. Sec. 461, Rev. C. 1907; re-en. Sec. 539, R. C. M. 1921.

Collateral References Elections == 161. 29 C.J.S. Elections § 149.

23-302. (540) Qualifications of voter. Every person of the age of twenty-one years or over, possessing the following qualifications, if his name is registered as required by law, is entitled to vote at all general and special elections and for all officers that now are, or hereafter may be, elective

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by the people, and upon all questions which may be submitted to the vote of the people: First, he must be a citizen of the United States; second, he must have resided in the state one year and in the county thirty days immediately preceding the election at which he offers to vote. No person convicted of felony has the right to vote unless he has been pardoned. Nothing in this section contained shall be construed to deprive any person of the right to vote who had such right at the time of the adoption of the state constitution. After the expiration of five years from the time of the adoption of the state constitution, no persons except citizens of the United States have a right to vote.

History: En. Sec. 1181, Pol. C. 1895; re-en. Sec. 462, Rev. C. 1907; re-en. Sec. 540, R. C. M. 1921, Cal. Pol. C. Sec. 1083.

NOTE.—The word "male" appearing in the first line of this section as enacted in 1895 is omitted from this code to conform to the constitutional amendment.

Voting Is an Affirmative Act, Vote for Deceased Candidate Not Counted as Opposed to Write-in

The casting of a ballot at an election of public officers is an affirmative, not a negative act—an act done with intention of voting for someone; hence if it is the purpose of voters to defeat a certain candidate, that purpose can be accomplished only by voting for some person in opposition to him, and not by voting for a person who died some weeks before election with the expectation that the vote cast for him would be counted as opposed to the person sought to be defeated; one who has died is no longer a person for whom, under section 2, article IX of the constitution, a voter may cast his ballot. State ex rel. Wolff v. Guerkink, 111 M 417, 426, 109 P 2d 1094, 133 ALR 304.

References

State ex rel. Kennedy v. Martin, 24 M

403, 408, 62 P 588; Sommers v. Gould, 53 M 538, 544, 165 P 599; State ex rel. Henderson v. Dawson County, 87 M 122, 142, 286 P 125; State ex rel. Durland v. Board of County Commrs. of Yellowstone County, 104 M 21, 27, 64 P 2d 1060; State ex rel. Van Horn v. Lyon, 119 M 212, 173 P 2d 891, 892; In re Ingersol's Estate, 128 M 230, 272 P 2d 1003, 1005.

Collateral References

Elections 59 et seq. 29 C.J.S. Elections § 16 et seq. 25 Am. Jur. 2d 751, Elections, § 58.

Removal by executive elemency of disqualification to vote resulting from conviction of crime as applicable in case of conviction in federal court or court of another state. 135 ALR 1493.

Validity of governmental requirement of oath of allegiance or loyalty as applied to voters. 18 ALR 2d 329.

State voting rights of residents of federal military establishment. 34 ALR 2d 1193.

What constitutes "conviction" within constitutional or statutory provision disenfranchising one convicted of crime. 36 ALR 2d 1238.

23-303. Qualifications of electors at elections on incurring state indebtedness. At all elections at which the question submitted is the incurring of a state debt, the issuance of bonds or debentures by the state, other than refunding bonds or debentures, or the levying of a state tax for any purpose, only registered electors residing within the state and who are tax-payers upon property therein and whose names appear upon the last completed assessment roll of some county of the state for state, county and school district taxes, shall be qualified to vote on such question. Whenever any such question is to be submitted at an election, other than a general biennial state election, the county clerk of each county must cause to be published one time in the official newspaper of the county a notice, signed by him, stating that registration will close at noon on the thirtieth day prior to the date for the holding of the election at which the question is to be submitted, unless the act providing for the submission of the question shall fix a different time for the giving of such notice and at that time

registration shall be closed. Such notice shall be published at least ten (10) days prior to the date when registration will be closed, unless the act providing for the submission of the question shall fix a different time for such closing of registration. Provided, that if the question is to be submitted at a general biennial state election then such notice of the closing of registration and the closing of registration shall be controlled and governed by the laws applying to the giving of such notice and closing of registration for such general biennial election.

History: En. Sec. 1, Ch. 28, L. 1945.

Objection Must Be Raised before Election

The objection that a measure creates a state debt, levy, or liability and that therefore it should have been placed upon a separate ballot as required by this section, is waived if not raised before the election. State ex rel. Graham v. Board

of Examiners, 125 M 419, 239 P 2d 283, 290.

References

Pioneer Motors, Inc. v. State Highway Commission, 118 M 333, 165 P 2d 796, 800.

Collateral References Elections ⇔ 79-83. 29 C.J.S. Elections §§ 28, 29.

23-304. Lists and precinct registers. After the closing of registrations the county clerk of each county shall promptly prepare lists of registered electors of all voting precincts in his county. He shall also prepare the precinct register for each precinct in the manner provided by section 23-515, and deliver the same to the judges of election prior to the opening of the polls. In preparing precinct registers it shall not be necessary for the county clerk to make separate precinct registers containing only the names of electors who are qualified to vote on the question of the incurring of a state debt, the issuance of bonds or debentures by the state or the levying of a state tax. In lieu of preparing such a list of electors qualified to vote on such question, the county shall stamp the word "TAX-PAYER" on the precinct register opposite the name of each qualified elector who is a taxpayer and entitled to vote upon any of the questions hereinbefore indicated. No other showing shall be required to establish that such elector is in fact a taxpayer and entitled to vote as such.

All of the laws of this state applying to the holding of general biennial state elections, in so far as the same are applicable thereto and not in conflict with any of the provisions of this act, shall apply to, and govern and control such election and the canvassing and return of the votes cast on such question at such election; and abstracts made by the several county clerks shall be returned to the secretary of state in the manner provided by sections 23-1812, 23-1813, for the abstract of votes for state officers.

History: En. Sec. 2, Ch. 28, L. 1945; amd. Sec. 1, Ch. 92, L. 1949; amd. Sec. 1, Ch. 64, L. 1959.

Collateral References
Elections 113.
29 C.J.S. Elections § 49.

23-305. Duties of secretary of state and county clerks. When any such law is to be submitted at a general biennial election, all of the provisions of section 37-107, prescribing the duties of the secretary of state and county clerks, shall apply to and govern and control the printing and distribution of copies of such law.

History: En. Sec. 3, Ch. 28, L. 1945.

23-306. Repealing clause—exception. All acts and parts of acts in conflict herewith are hereby repealed; provided, however, that nothing in this act shall be deemed to repeal section 23-307.

History: En. Sec. 4, Ch. 28, L. 1945.

Qualification of electors on elections concerning state tax levy or debt. Whenever any question is submitted at any election concerning the creation of any tax levy for the state or the creation of any debt or liability on the part of the state, all qualified electors who are registered and whose names appear upon the last completed assessment roll of any county preceding such election, shall be entitled to vote thereon. If any elector shall be registered in any county and the name of such elector does not appear on such last completed assessment roll for such county, but does appear on the last completed assessment roll for any other county in the state, such elector shall be entitled to vote on any such question in the precinct in which he is registered, if he shall present to the county clerk and recorder before the close of registration of the election in which he wishes to vote, either a receipt from the treasurer of the county in which his property is assessed on such assessment roll showing the payment of the taxes computed against such assessment, or a certificate from the treasurer of such county certifying that such elector is assessed with property on such assessment roll but that the taxes had not been paid at the time of the issuance of such certificate. Every such certificate issued by a county treasurer shall be dated, numbered, give the name of the elector, a brief description of the property assessed to him, with the amount of the taxes thereon, and must be signed by such county treasurer, and such treasurer must keep a duplicate thereof on file in his office. Whenever any such tax receipt or treasurer's certificate is presented by a registered elector to the county clerk and recorder he shall enter his name in the pollbook of electors entitled to vote on such question, and there shall be entered therein the date and number of the tax receipt or certificate, the county in which issued and a description of the property assessed to the elector and amount of taxes against the same, as contained in such receipt or certificate, and such elector shall thereupon be given the proper ballot and shall vote the same in exactly the manner as though his name appeared on such assessment roll for such county.

History: En. Sec. 1, Ch. 44, L. 1941.

23-308. (541) Privilege from arrest. Electors must in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning therefrom.

History: En. Sec. 1183, Pol. C. 1895; re-en. Sec. 464, Rev. C. 1907; re-en. Sec. 541, R. C. M. 1921. Cal. Pol. C. Sec. 1069.

Collateral References
Elections 233.
29 C.J.S. Elections § 215.

Cross-Reference

Persons exempt from arrest, sec. 95-616.

23-309. (542) Exempt from military duty on election day. No elector is required to perform military duty on the days of election, except in times of war or public danger.

History: En. Sec. 1184, Pol. C. 1895; re-en. Sec. 465, Rev. C. 1907; re-en. Sec. 542, R. C. M. 1921. Cal. Pol. C. Sec. 1070.

23-310. (543) Idiot or insane. No idiot or insane person is entitled to vote at any election in this state.

History: En. Sec. 1185, Pol. C. 1895; re-en. Sec. 466, Rev. C. 1907; re-en. Sec. 543, R. C. M. 1921. Cal. Pol. C. Sec. 1084.

Collateral References
Elections 59.
29 C.J.S. Elections 8 16.

23-311. (544) Who are taxpayers. The payment of a tax upon property by any person assessed therefor on a county or city assessment roll next preceding the election at which a question is to be submitted to the vote of the taxpayers of the state, or to the vote of the taxpayers of such county or city, or any subdivision thereof, constitutes such person a taxpayer at such election.

History: En. Sec. 1188, Pol. C. 1895; re-en. Sec. 469, Rev. C. 1907; re-en. Sec. 544, R. C. M. 1921.

NOTE.—Since the constitutional amendment granting equal rights of suffrage to women, section 468 of the Revised Codes of Montana, 1907, has been omitted from this codification and the last line of section 23-311 as enacted has also been omitted.

Voting on City Indebtedness

Since Chapter 47, Laws of 1929, impliedly repeals section 5278, Revised Codes, 1921 (since repealed), providing that only taxpayers as defined by this section shall be entitled to vote on questions concern-

ing the creation or increasing of indebtedness incident to a city water plant, it also supersedes this section, and a city no longer may require payment of taxes as a condition to the right of an elector on proposals to create or increase city indebtedness. Weber v. City of Helena, 89 M 109, 116, 297 P 455.

References

City of Billings v. Nore, — M —, 417 P 2d 458, 464.

Collateral References

Elections 83. 29 C.J.S. Elections § 29.

CHAPTER 4

ELECTION PRECINCTS

Section 23-401. Establishment of election precincts.

23-402. Change in boundaries of precinct.

23-403. City council to certify ward boundaries.

23-404. County surveyor to make map of precincts.

23-405. City council to prepare map of wards.23-406. Board to designate place in precinct for holding elections.

23-407. Proceedings where place not designated, etc.

23-401. (545) Establishment of election precincts. The territorial unit for the conduct of elections shall be the election precinct. The board of county commissioners of each county shall establish a convenient number of election precincts therein having reference to equalizing the number of electors in the several precincts as nearly as possible. Precinct boundaries shall conform to the wards of incorporated cities of the first, second and third class and to the boundaries of school districts of the first class only, provided that any ward or school district may be divided into two or more precincts and any precinct may be divided into two or more precincts and any precinct may be divided into two or more precincts and third class, election precincts may, however, include two or more wards, or may comprise the territory included by one or more wards, together with contiguous territory lying outside the said incorporated towns.

History: En. Sec. 2, Ch. 113, L. 1911; M. 1921; amd. Sec. 1, Ch. 25, L. 1929. Cal. amd. Sec. 2, Ch. 74, L. 1913; amd. Sec. Pol. C. Secs. 1127-1132. 2, Ch. 122, L. 1915; re-en. Sec. 545, R. C.

References

Atkinson v. Roosevelt County, 71 M 165, 181, 227 P 811.

Collateral References

Elections \$46, 48.
29 C.J.S. Elections \$8 53, 54.

23-402. (546) Change in boundaries of precinct. The board of county commissioners may change the boundaries of precincts and create new or consolidated established precincts, but no precincts shall be changed or created between the first day of January and the first day of December in any year during which a general election is to be held within the state of Montana. All changes, alterations, or modifications in precinct boundaries must be certified to the county clerk within three days after the order making same shall have been made. All election precincts shall be designated by numbers but may also be designated by distinctive names in addition to such numbers.

History: En. Sec. 3, Ch. 113, L. 1911; amd. Sec. 3, Ch. 74, L. 1913; amd. Sec. 3, Ch. 122, L. 1915; re-en. Sec. 546, R. C. M. 1921.

References

Atkinson v. Roosevelt County, 71 M 165, 181, 227 P 811.

Collateral References Elections 48. 29 C.J.S. Elections § 54.

23-403. (547) City council to certify ward boundaries. The city council of all incorporated cities and towns within the state of Montana shall certify to the county clerk and ex officio registrar of the county within which such city or town is situated, a description of the boundaries of the several wards within such city or town, and in like manner shall certify any changes or alterations in such boundaries that may from time to time be made, within ten days after the same are made.

History: En. Sec. 4, Ch. 113, L. 1911; amd. Sec. 4, Ch. 74, L. 1913; amd. Sec. 4, Ch. 122, L. 1915; re-en. Sec. 547, R. C. M. 1921.

References

Weber v. City of Helena, 89 M 109, 123, 297 P 455.

23-404. (548) County surveyor to make map of precincts. The county surveyor of each county must, within ten days after the board of county commissioners shall have established or changed the boundaries of any election precincts within such county, deliver to the county clerk of the county a map correctly showing the boundaries of all precincts and school districts within the county as then existing.

History: En. Sec. 5, Ch. 113, L. 1911; amd. Sec. 5, Ch. 74, L. 1913; amd. Sec. 5, Ch. 122, L. 1915; re-en. Sec. 548, R. C. M. 1921.

References

Atkinson v. Roosevelt County, 71 M 165, 181, 227 P 811.

23-405. (549) City council to prepare map of wards. The city council of any incorporated city or town shall, within ten days after the ward lines of such city or town shall have been established or changed, deliver or cause to be delivered to the county clerk of said county a map correctly showing the boundaries of the wards within such city or town as then existing; such map shall also show all streets, avenues, and alleys by name, and the respective wards by numbers, with the ward boundaries clearly defined thereon.

History: En. Sec. 6, Ch. 113, L. 1911; amd. Sec. 6, Ch. 74, L. 1913; amd. Sec. 6, Ch. 122, L. 1915; re-en. Sec. 549, R. C. M. 1921.

References

Weber v. City of Helena, 89 M 109, 123, 297 P 455.

23-406. (550) Board to designate place in precinct for holding elections. The board must, at the session at which judges of election are appointed, make an order designating the house or place within the precinct where the election must be held.

History: En. Sec. 1243, Pol. C. 1895; re-en. Sec. 497, Rev. C. 1907; re-en. Sec. 550, R. C. M. 1921.

Collateral References

Elections 203.

29 C.J.S. Elections § 193. 26 Am. Jur. 2d 61, Elections, § 228.

References

Atkinson v. Roosevelt County, 71 M 165, 181, 227 P 811.

23-407. (551) Proceedings where place not designated, etc. If the board fails to designate the house or place for holding the election, or if it cannot be held at the house or place designated, the judges of election, or a majority of those acting as such in the precinct must, two days before the election and by order, under their hand (copies of which they must at once post in three public places in the precinct), designate the house or place.

History: En. Sec. 1244, Pol. C. 1895; reen. Sec. 498, Rev. C. 1907; reen. Sec. 551, R. C. M. 1921.

Changing Designation

Where a board of county canvassers refused to canvass election returns from a precinct on the ground that it appeared upon the face of the returns that the election had not been held at the place designated by the board of county commissioners, and on application for writ of mandate to compel them to act, nothing was shown affirmatively by pleadings or otherwise that the judges of election at the precinct had not pursued this section giving them authority to change the place of election upon two days' notice if for

any reason it cannot be held at the place appointed, it will be presumed that official duty was regularly performed by them and that they did change it, and the writ will issue commanding action. State ex rel. Moore v. Patch, 65 M 218, 225, 211 P 202.

References

Atkinson v. Roosevelt County, 71 M 165, 181, 227 P 811.

Collateral References

Elections 203.

29 C.J.S. Elections § 193.

26 Am. Jur. 2d 61, 62, Elections §§ 228, 229.

CHAPTER 5

REGISTRATION OF ELECTORS

Section 23-501. County clerk as county registrar.

23-501.1. New-voter lists furnished to political parties.

23-502. Registry book and card index—affidavit of voter—lost naturalization papers.

23-503. Method of registering.

23-504. Elector infirm or residing at a distance.

3-505. Notaries and justices of the peace—deputy registrars—compensation.

23-506. Penalty for violation of act.

23-507. Hours of registration-registry cards-duty of clerk.

23-508. Procedure when applicant not qualified at time of registration.

23-509. Transfer of registration within county.

23-510. Inquiry as to previous registrations—procedure.

23-511. Cancellation of registry for failure to vote—reregistration—exception of persons in United States service.

23-512. Withdrawal from cancellation of registration eards of persons in mili-

tary service.

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23-513. Close of registration—procedure.

23-514. Printing and posting of lists of registered electors.

23-515. Precinct register—combining—when not furnished city or town.
23-516. Registration during period closed for election.
23-517. Cancellation of registrations.

23-518. Cancellation of registration cards, when.

23-519. Compensation of county clerks.

23-520. Copies of precinct registers.
23-521. Challenges and action to be taken thereon.
23-522. Residence, rules for determining.

23-523. Certificates of naturalization, presentation to registrar.

23-524. Voter to sign precinct register books.

23-525. Compelling entry of names in great register.
23-526. Name of voter must appear in copy of register—identification of voter.
23-527. Omission of name from precinct registers—remedy.

23-528. Authority of deputy county clerk. 23-529. "Elector" defined.

"Election" defined. 23-530.

23-531.

Violation of act, penalty for. Challenging of elector and administration of oath. 23-532.

Acts constituting violation of law-penalty. 23-533.

23-534. County commissioners to supply clerk with help.

23-501. (553) County clerk as county registrar. The county clerk of each county of the state of Montana is hereby declared to be ex officio county registrar of such county, and shall perform all acts and duties in this act provided without extra pay or compensation therefor. He shall have the custody of all registration books, cards, and papers herein provided for, and the register hereinafter provided for to be kept by said county clerk is hereby declared to be an official record of the office of the county clerk of each county.

History: En. Sec. 1, Ch. 113, L. 1911; amd. Sec. 1, Ch. 74, L. 1913; amd. Sec. 1, Ch. 122, L. 1915; re-en. Sec. 553, R. C. M. 1921. Cal. Pol. Secs. 1094-1119.

Bawden, 51 M 357, 361, 152 P 761; State ex rel. Durland v. Board of County Commrs. of Yellowstone County, 104 M 21, 28, 64 P 2d 1060.

References

State ex rel. Kehoe v. Stromme, 49 M 25, 139 P 1002; State ex rel. Eagye v.

Collateral References

Elections 100. 29 C.J.S. Elections § 42.

23-501.1. New-voter lists furnished to political parties. The county clerk in each county shall, not later than thirty (30) days prior to the close of registration for any general election, as provided in section 23-513, submit to the county chairman of the two major political parties, a list of all persons residing in the county, who have reached voting age since the last general election. This list shall be prepared from all available sources in the county, and it shall be the duty of the other county, city and school officials to co-operate with the county clerk in preparing such list. The county clerk and other officials shall, in no event, be responsible for any honest error or omission in preparing such list.

History: En. Sec. 5, Ch. 98, L. 1965.

23-502. (554) Registry book and card index—affidavit of voter—lost naturalization papers. The official register of electors in each county shall be contained in a book designated "register," which book shall be so arranged in precincts and alphabetical divisions suitable to record the full and complete information given by each elector, and a card index of which the county clerk of such county shall at all times have the custody. The cards shall be four by six inches in size, of white calendar stock, and shall be so perforated that all cards in any drawer may be fastened in by a rod passing through such perforations, which rod shall be kept locked except when the clerk shall be making necessary changes in the register. The registry book herein provided shall be in such form as shall be designated by the secretary of state of the state of Montana. The registry card shall be substantially in the following form:

(Face.) State of Montana, county of ss. Date Name Where born Date of birth Height Occupation Ft.-In. Naturalized when Where Residence Post office Sec. Twp. Rg. Length of time in Precinct Ward School Dist. State County City Date canceled Date registered Disability, if any Place where last registered State of Montana, County of being duly sworn says: I am the elector whose name appears on the face of this card; the several statements thereon contained affecting my qualifications as an elector are true; I am able to mark my ballot (or I am unable to mark my ballot by reason of the physical disabilities on this card specified), and I am not registered elsewhere within the state of Montana and claim no right to vote elsewhere than in the precinct on this card specified, so help me God. Subscribed and sworn to before me this day of 19.... County Clerk and Ex officio Registrar. By Deputy. 23-503

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(Back.)

Affidavit of Lost Naturalization Papers.

State of Montana, County ofss.
elector named on the face of this card; I am a naturalized citizen of the United States; my certificate of naturalization is lost or destroyed, or beyond my present reach, and I have no certified copy thereof; I came to the United States in the year; I was admitted to citizenship in the state (or territory) of; I was admitted to citizenship in the state (or territory) of; I last saw my certificate of naturalization, or a certified copy thereof, at
Subscribed and sworn to before me this day of
\$00\$0000000000000000000000000000000000

History: En. Sec. 7, Ch. 113, L. 1911; amd. Sec. 7, Ch. 74, L. 1913; amd. Sec. 7,

Ch. 122, L. 1915; re-en. Sec. 554, R. C. M. 1921; amd. Sec. 1, Ch. 98, L. 1965.

Collateral References

Elections 206, 110. 29 C.J.S. Elections §§ 39, 46, 47. 25 Am. Jur. 2d 784, Elections, § 95.

Validity of statute requiring information as to age, sex, residence, etc., as a condition of registration. 14 ALR 260.

County Clerk and Ex officio Registrar.

By Deputy.

Propriety of test or question asked applicant for registration as voter other than formal questions relating to specific conditions of his right to registration. 76 ALR 1238.

Constitutionality of statutes in relation to registration before voting at election or primary. 91 ALR 349.

Nonregistration as affecting legality of votes cast by persons otherwise qualified. 101 ALR 657.

23-503. (555) Method of registering. Any elector residing within the county may register by appearing before the county clerk and ex officio registrar and making correct answers to all questions propounded by the county clerk touching the items of information called for by such registry card, and by signing and verifying or affirming the affidavit or affidavits on the back of such card. Any elector in the United States service who is absent from the state of Montana and the county of which he or she is a resident may register either (a) by mailing such registry card filled out and signed under oath to the county clerk of the county in which said elector resides, or (b) by mailing the federal post card application filled out and signed under oath to said county clerk.

If any person shall falsely personate another and procure the person so personated to be registered, or if any person shall represent his name to the county clerk or to the registration clerk or to any other person qualified to register an elector, to be different from what it actually is, and cause such name to be registered, or if any person shall cause any name to be placed upon the registry lists otherwise than in the manner provided in this act, he shall be guilty of a felony, and upon conviction be imprisoned in the state penitentiary for not less than one (1) nor more than three (3) years.

History: En. Sec. 8, Ch. 122, L. 1915; re-en. Sec. 555, R. C. M. 1921; amd. Sec. 4, Ch. 172, L. 1937; amd. Sec. 1, Ch. 83, L. 1953; amd. Sec. 1, Ch. 18, L. 1959; amd. Sec. 2, Ch. 98, L. 1965.

Collateral References

Elections 98, 106, 312. 29 C.J.S. Elections §§ 39, 40, 46, 326.

23-504. (556) Elector infirm or residing at a distance. If any elector resides more than ten miles distant from the office of the county clerk, he may register before the deputy registrar within the precinct where such elector resides. If by reason of physical infirmity the elector is unable to appear before the county clerk or any deputy registrar, he may send written notice to the county clerk or to the deputy registrar of such disability, with the request that his registration be made at his residence. Upon receipt of such notice and request it shall be the duty of the county clerk or deputy registrar, as the case may be, to make the registration of such elector at his residence; provided, that no greater sum than twenty-five cents may be charged or received by any officer or person for taking the registration of the elector herein provided for; and provided further, that no officer or person shall be entitled to receive from any county in the state of Montana any charge for expenses incurred by reason of the provisions of this section.

History: En. Sec. 15, Ch. 74, L. 1913; amd. Sec. 9, Ch. 122, L. 1915; re-en. Sec. 556, R. C. M. 1921.

Collateral References
Elections = 106.
29 C.J.S. Elections §§ 39, 46.

23-505. (557) Notaries and justices of the peace—deputy registrars -compensation. All notaries public and justices of the peace are designated as deputy registrars in the county in which they reside, and may register electors residing in any precinct within the county and shall receive as compensation for their services the sum of twenty-five cents (25¢) for each elector registered by them, provided that they shall receive no compensation for their services where the elector resides less than ten (10) miles from the county courthouse. The county commissioners shall appoint two deputy registrars, one from each of the two major political parties in this state, other than notaries public and justices of the peace, for each precinct in the county. Such deputy registrar shall be a qualified, taxpaying resident elector in the precinct for which he is appointed and shall register electors in that precinct, and shall receive as compensation for his services the sum of twenty-five cents (25¢) for each elector registered by him, Each deputy registrar shall forward by mail, within two (2) days, all registration cards filled out by him to the county clerk and recorder.

History: En. Sec. 10, Ch. 122, L. 1915; amd. Sec. 1, Ch. 38, L. 1917; re-en. Sec. 557, R. C. M. 1921; amd. Sec. 5, Ch. 172, L. 1937; amd. Sec. 1, Ch. 51, L. 1941; amd. Sec. 1, Ch. 80, L. 1955; amd. Sec. 3, Ch. 98, L. 1965.

Collateral References Elections 100. 29 C.J.S. Elections § 42.

23-506. Penalty for violation of act. Any person who shall make false answers, either for himself or another, or shall violate or attempt to violate any of the provisions of this act, or knowingly encourage another to violate the same, or any public officer or officers, employees, deputies, or assistants, or other persons whomsoever, upon whom any duty is imposed by this act,

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or any of its provisions, who shall neglect such duty, or mutilate, destroy, secrete, alter or change any such registry books, cards or records required, or shall perform it in such way as to hinder the objects and purposes of this act, shall be deemed guilty of a felony, shall, upon conviction thereof, be punished by imprisonment in the state prison for a period of not less than one (1) year or more than ten (10) years, and if such person be a public officer, shall also forfeit his office, and never be qualified to hold public office, either elective or appointive, thereafter.

History: En. Sec. 6, Ch. 172, L. 1937. Collateral References

Elections © 312.
29 C.J.S. Elections § 326.

23-507. (558) Hours of registration—registry cards—duty of clerk. The office of the county clerk shall be open for registration of voters between the hours of nine a. m. and five p. m. on all days except legal holidays. Registry cards shall be numbered consecutively in the order of their receipt at the office of the county clerk; provided, however, that electors who are registered upon the registry books in use in any county prior to the passage and approval of this law shall retain upon their registry cards the same number as they have severally had upon such books; and provided also that such electors need not again appear at the office of the county clerk to register, but the county clerk is hereby authorized to fill out from such registry books registry cards for all electors entitled to vote at the time of the passage and approval of this law, transcribing from such books the data called for by such cards. The cards so filled out from the registry books shall be marked "transcribed" by the county clerk, and shall constitute part of the official register, and shall entitle the elector represented by each such card to vote in the same manner as if the card had been filled out, signed and verified by such elector. The county clerk shall classify registry cards according to the precincts in which the several electors reside, and shall arrange the cards in each precinct in alphabetical order. The cards for each precinct shall be kept in a separate filing case or drawer which shall be marked with the number of the precinct. The county clerk shall, immediately after filling out the card index or registry cards as herein provided, enter upon the official register of the county in the proper precinct the full information given by said elector.

History: En. Sec. 11, Ch. 122, L. 1915; re-en. Sec. 558, R. C. M. 1921.

Collateral References Elections 205, 109, 110. 29 C.J.S. Elections §§ 39, 47.

23-508. (559) Procedure when applicant not qualified at time of registration. If any applicant for registration applies to be registered who has not resided within the state of Montana, or the county or city, for the required length of time, and who shall be entitled to and is qualified to register on or before the day of election, provided he answers the question of the county clerk in a satisfactory manner, and it is made to appear to the county clerk that he will be entitled to become a qualified elector by the date upon which the election is to be held, the county clerk shall accept such registration. If any person applies to be registered who is not a citizen of the United States, but states that he will be qualified to be registered as a citizen of the United States before the date upon which the

election is to be held, the county clerk shall accept such registration, but shall place opposite the name of such person the words, "to be challenged for want of naturalization papers," and such person shall not be entitled to vote unless he exhibits to the judges of election his final naturalization papers.

History: En. Sec. 12, Ch. 113, L. 1911; amd. Sec. 12, Ch. 74, L. 1913; amd. Sec. 12, Ch. 122, L. 1915; re-en. Sec. 559, R. C. M. 1921.

Collateral References
Elections 106.
29 C.J.S. Elections §§ 39, 46.

23-509. (560) Transfer of registration within county. Every elector, on changing his residence from one precinct to another within the same county, may cause his registry card to be transferred to the register of the precinct of his new residence, by executing in person a registry card as described in section 23-502 before the deputy registrar of the new precinct or before a notary public or justice of the peace residing within the county, provided that the deputy registrar, notary public or justice of the peace will receive no compensation for this service, or by a request in writing to the county clerk of such county, in the following form:

Dated at ———, on the ——— day of ———, 19—.

Whenever it shall be more convenient for any elector residing outside of an incorporated city or town to vote in another precinct in the same political township in the county, such elector may cause his registry card to be transferred from the precinct of his residence to such other precinct, by filing in the office of the county clerk of such county, at least thirty (30) days prior to any election, a request in writing in the following form:

Dated at on the day of, 19.......

When the elector desires to change his place of registration within a county by a request in writing to the county clerk as provided above, the county clerk shall compare the signature of the elector upon such written request, with the signature upon the registry card of the elector as indicated, and may question the elector as to any of the information contained upon such registry card, and if the county clerk is satisfied concerning the identity of the elector and his right to have such transfer made, he shall endorse upon the registry card of such elector the date of the transfer and the precinct to which transferred, and shall file said card in the register of the precinct of the elector's present residence, or of the precinct to which he has requested that his registry card be transferred, and the

county clerk shall in each case make a transfer of the elector's name, together with all data connnected therewith, to the proper precinct in the register.

Where the elector changes his place of registration within a county by executing a new registry card in the presence of a deputy registrar, notary public or justice of the peace as provided in the first paragraph of this section, the county clerk shall file said new card in the register of the precinct of the elector's present residence and shall make a transfer of the elector's name, together with all data connected therewith, to the proper precinct in the register. The old registry card shall be marked "canceled" and placed in the "canceled file" described in section 23-511.

History: En. Sec. 17, Ch. 113, L. 1911; amd. Sec. 17, Ch. 74, L. 1913; amd. Sec. 13, Ch. 122, L. 1915; amd. Sec. 1, Ch. 29, L. 1919; re-en. Sec. 560, R. C. M. 1921; amd. Sec. 2, Ch. 80, L. 1955.

Collateral References
Elections © 119.
29 C.J.S. Elections § 52.
25 Am. Jur. 2d 794, Elections, § 107.

23-510. (561) Inquiry as to previous registrations—procedure. That in the case of all future registrations, as required by the election laws of the state of Montana, it shall be the duty of the clerk to question each person registering, and ascertain whether or not he has previously registered in the state of Montana. If the person desiring to register has previously registered, the county clerk shall enter his name in a separate file for such purpose, which said file shall be indexed by counties. Cards for such purpose shall be substantially in the following form:

DESTRUCTOR

AVANALI		VOID		
		(City)	(County)	
BIRTHPLACE			AGE	
PREVIOUS RESIDENCE				
	(City)	(Co	(County)	
In compliance with the election laws of the State of Montana, I am hereby submitting, for your information, the above named elector, who has, on				
	Clerk and Recorder and ex officio registrar			
	***************	County		

Immediately, and not later than three (3) days after the closing of the registration books, the clerk shall forward the above forms to the clerk in the county in which applicant previously voted, either by registered mail or express, and receipt of delivery demanded, said receipt to be kept on file with other election records.

Upon receiving such notice, it will be the duty of the clerk to immediately cancel the registration of the elector in his county, being the county in which said elector previously voted. This must be done by draw-

ing a red line through the elector's name in the register, and also through his name on the registration card.

History: En. Sec. 14, Ch. 122, L. 1915; re-en. Sec. 561, R. C. M. 1921; amd. Sec. 3, Ch. 172, L. 1937.

Collateral References Elections 2119. 29 C.J.S. Elections § 52.

23-511. (562) Cancellation of registry for failure to vote—reregistration-exception of persons in United States service. Immediately after every general election, the county clerk of each county shall compare the list of electors who have voted at such election in each precinct, as shown by the official pollbooks, with the official register of said precinct, and he shall remove from the official register herein provided for the registry cards of all electors who have failed to vote at such election, and shall mark each of said cards with the word "canceled," and shall place such canceled cards for the entire county in alphabetical order in a separate drawer to be known as the "canceled file"; but any elector whose card is thus removed from the official register may reregister in the same manner as his original registration was made, and the registration card of any elector who thus reregisters shall be filed by the county clerk in the official register in the same manner as original registration cards are filed. The county clerk shall, at the same time, cancel, by drawing a red line through the entry thereof, the name of all such electors who have failed to vote at such election.

All electors whose registry cards are so removed and marked "canceled," shall within thirty (30) days thereafter, be notified by the county clerk in writing of such removal, by sending a notice to such elector to his or her post-office address, as appearing on the registration books, cards indexes, and register of electors.

In the case of an elector in the United States service who shall fail to vote, his or her registry card shall not be canceled, except for causes designated under section 23-518.

History: En. Sec. 15, Ch. 122, L. 1915; re-en. Sec. 562, R. C. M. 1921; amd. Sec. 1, Ch. 147, L. 1937; amd. Sec. 1, Ch. 144, L. 1941; amd. Sec. 1, Ch. 177, L. 1943; amd. Sec. 2, Ch. 18, L. 1959; amd. Sec. 4, Ch. 98, L. 1965.

References

State ex rel. Durland v. Board of Coun-

ty Commrs. of Yellowstone County, 104 M 21, 28, 64 P 2d 1060; Taylor v. Taylor, 125 M 341, 238 P 2d 904, 906.

Collateral References
Elections \$\infty\$ 108.
29 C.J.S. Elections \$ 48.

23-512. Withdrawal from cancellation of registration cards of persons in military service. It shall be the duty of the county clerk of each county, on or before the close of registration before any election to be held in the state of Montana following the general election held in November of 1942, to withdraw from the "canceled file" the registration card of any person serving in the land or naval forces of the United States, including the members of the army nurse corps, the navy nurse corps, the women's navy reserve, and the women's army auxiliary corps, and such other branches of the land and naval forces as may be organized hereafter by the government of the United States including persons engaged in the actual service of the American national red cross association, or the united service organizations

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or any similar organizations auxiliary to the land and naval forces recognized by the government of the United States whose registry card has been removed from the official register since the date of the general election held in November of 1942, and return such card to the official register and enter the name of such elector upon the proper registration rolls, provided that on or before the close of registration before any election to be held in the state of Montana following the general election held in November of 1942 the county clerk is furnished an affidavit or affidavits by at least two (2) registered electors of the county in which such elector serving in the land or naval forces of the United States, including persons of the army nurse corps, the navy nurse corps, the women's naval reserve, the women's army auxiliary corps, and such other branches of the land and naval forces as may be organized hereafter by the government of the United States including persons engaged in the actual service of the American national red cross association, or the united service organizations or any similar organizations auxiliary to the land and naval forces recognized by the government of the United States was registered at the time of such election, setting forth the affiants are personally acquainted with such elector and are informed and have reason to believe such elector was engaged in active service in the land or naval forces of the United States, including persons of the army nurse corps, the navy nurse corps, the women's navy reserve, the women's army auxiliary corps, and such other branches of the land and naval forces as may be organized hereafter by the government of the United States including persons engaged in the actual service of the American national red cross association, or the united service organizations or any similar organizations auxiliary to the land and naval forces recognized by the government of the United States on the day of such election and his residence is still within the county where he is registered; provided further, however, this shall not apply to those registration cards which have been canceled for any of the causes designated under section 23-518.

History: En. Sec. 2, Ch. 177, L. 1943.

(566) Close of registration — procedure. The county clerk shall close all registration for the full period of forty (40) days prior to and before any election. He shall immediately transmit to the secretary of state a certificate showing the number of voters registered in each precinct in said county. The county clerk of each county must cause to be published in a newspaper within his county, having a general circulation therein, for twenty (20) days before which time when such registration shall be closed for any election, a notice signed by him to the effect that such registration will be closed on the day provided by law, and which day shall be specified in such notice; and must also state that electors may register for the ensuing election by appearing before the county clerk at his office, or by appearing before a deputy registrar or before any notary public or justice of the peace in the manner provided by law. The publication of such notice must continue for the full period of twenty (20) days. At least twenty (20) days before the time when the official register is closed for any election, the county clerk shall cause to be posted in each voting precinct at such election, notice of the time when the official register will close for such election.

History: En. Sec. 18, Ch. 113, L. 1911; amd. Sec. 18, Ch. 74, L. 1913; amd. Sec. 16, Ch. 122, L. 1915; amd. Sec. 1, Ch. 97, L. 1919; re-en. Sec. 566, R. C. M. 1921; amd. Sec. 3, Ch. 156, L. 1965.

References

State ex rel. Cryderman v. Wienrich, 54

M 390, 399, 170 P 942; State ex rel. Van Horn v. Lyon, 119 M 212, 173 P 2d 891, 892.

Collateral References

Elections 105. 29 C.J.S. Elections § 39.

DECISIONS UNDER FORMER LAW

Duty of County Clerk

Section 566, R. C. M. 1921, impliedly adopted by chapter 47, Laws of 1929 (84-4711) and sections 567, 568 and 571, R. C. M. 1921, incorporated therein by reference, relating to the duties of the county clerk in connection with the registration of electors, control in an election on proposals to create or increase city indebtedness.

Weber v. City of Helena, 89 M 109, 112, 297 P 455.

Time for Holding Election

Under this section, as amended in 1915, a period of not less than sixty days was required to elapse between the time an election was called and the time it was held. State ex rel. Eagye v. Bawden, 51 M 357, 361, 152 P 761.

23-514. (567) Printing and posting of lists of registered electors. The county clerk shall, at least ten (10) days preceding any election, cause to be printed and posted a list of all electors entitled to be registered as shown by the official register of the county, and who are on the precinct registers as entitled to vote in the several precincts of such county, city or town, or school district of the first class, provided, that if the city clerk of any city or town shall, in writing, certify to the county clerk, not less than twenty-five (25) days before the date fixed by law for the holding of any primary nominating election, that no petitions for nomination under the direct primary election law for any office to be filled at the next ensuing annual city election have been filed with such city or town clerk, not less than thirty (30) days before the date fixed by law for the holding of the primary nominating election, then the county clerk shall not cause to be printed or posted such list of registered electors for such city or town. Such printed list of registered electors shall contain the name of the elector in full, together with his residence, giving the number and street, or the name of the house, (......) and in all cases where the elector resides outside of the city or town, such printed list shall contain the post-office address of such elector, as shown by the official register card of the elector, and the registry number. The expense of printing said list shall be paid by said county, city or town, or school district, in which the election is to be held. The county clerk shall cause to be posted at each precinct in the county, not less than ten (10) days before any election, as in this act provided for, a copy of the list of registered voters herein provided for, and shall retain sufficient number of said printed lists of registered voters in his office as may be necessary for the convenience of the public. He shall furnish to any qualified elector of any county, city or town or school district applying therefor a copy of the same. When the list of registered voters herein provided for has been printed and posted for any primary election, the same may be posted and used for the general election, but only if a supplemental list giving the names of electors who may have registered after the first list was prepared is printed and posted therewith.

History: Ap. p. Sec. 24, Ch. 113, L. 1911; amd. Sec. 24, Ch 74, L. 1913; amd. Sec. 17, Ch. 122, L. 1915; amd. Sec. 2, Ch. 97, L. 1919; amd. Sec. 1, Ch. 235, L. 1921; re-en. Sec. 567, R. C. M. 1921; amd. Sec. 1, Ch. 61, L. 1933; amd. Sec. 1, Ch. 167, L. 1945; amd. Sec. 4, Ch. 156, L. 1965.

References

State ex rel. Cryderman v. Wienrich,

54 M 390, 399, 170 P 942; Weber v. City of Helena, 89 M 109, 112, 297 P 455; State ex rel. Fisher v. School District No. 1, 97 M 358, 365, 34 P 2d 522; State ex rel. Wulf v. McGrath, 111 M 96, 100, 106 P 2d 183.

Collateral References

Elections 109. 29 C.J.S. Elections § 47.

23-515. (568) Precinct register—combining—when not furnished city or town. During the time intervening between the closing of the official register and the day of the ensuing election, the county clerk shall prepare for each precinct a book to be known as the "precinct register" which shall be for the use of the clerks and judges of election in each such precinct. Such books shall be arranged for the listing of the names of the electors in alphabetical divisions, each division to be composed of ruled columns with appropriate headings, under which the information contained upon the registry card of each elector shall be transcribed, excepting the oath of the elector, and the certified copy of the precinct registers so prepared shall be delivered to the judges of the election at or prior to the opening of the polls in each precinct. Where the precincts in municipal elections, or in elections in school districts of the first class, include more than one county precinct, the county clerk shall combine into one precinct register the names of all electors in the several precinct registers of the precincts of which such municipal or school district precinct is composed. The county clerk shall omit from the list of names of all certified voters so inserted in the precinct register herein provided for, the names and registry of all electors which it is the duty of the county clerk to cancel under the provisions of section 23-518, provided that the requirements contained in the provisions of said section shall have been brought to the attention of the county clerk not less than twenty days preceding the election. If the city clerk of any city or town shall, in writing, certify to the county clerk, not less than twenty-five days before the date fixed by law for the holding of any primary nominating election, that no petitions for nomination under the direct primary election law for any office to be filled at the next ensuing annual city election have been filed with such city clerk, not less than thirty days before the date fixed by law for the holding of the primary nominating election, then the county clerk shall not prepare for the city any precinct register or precinct registers for that year.

History: En. Sec. 23, Ch. 113, L. 1911; amd. Sec. 23, Ch. 74, L. 1913; amd. Sec. 18, Ch. 122, L. 1915; amd. Sec. 3, Ch. 97, L. 1919; re-en. Sec. 568, R. C. M. 1921; amd. Sec. 2, Ch. 61, L. 1933; amd. Sec. 2, Ch. 64, L. 1959.

References

Weber v. City of Helena, 89 M 109, 112, 297 P 455.

Collateral References

Elections 212. 29 C.J.S. Elections § 197.

23-516. (569) Registration during period closed for election. Whenever the period during which the official registry is closed preceding any election shall occur during the time within which any elector is entitled to register for another election, such elector shall be permitted to register for

such other election, but the county clerk shall retain his registry card in a separate file until the official register is again open for filing of cards, at which time all cards in such temporary file shall be placed in their proper position in the official register.

History: En. Sec. 19, Ch. 122, L. 1915; re-en. Sec. 569, R. C. M. 1921.

Collateral References
Elections 106.
29 C.J.S. Elections 8 39.

23-517. Cancellation of registrations. In all counties within the state of Montana, the county clerk and ex officio "registrar" shall, within five (5) days after the first day of June, 1937, cancel all registrations of electors in the county and shall burn all "card indexes," "registry cards" and "affidavits" theretofore executed and signed by any elector for the purpose of registration; also, all copies of the registration books used at any elections theretofore held and shall preserve the "register" theretofore used as a permanent file of the office of the county clerk.

The county clerk must cause to be published in a newspaper of general circulation, published in the county, a notice which shall state that all registrations of electors will be canceled as of the first day of June, 1937, and that duly qualified electors desiring to vote at any subsequent election in the state of Montana, are required to register in the manner and form provided for under the general registration laws, and laws amendatory thereto, of the state of Montana. Said notice shall be published once a week for a period of four consecutive weeks. Failure to publish said notice shall not affect a registration of electors, nor of any election thereafter held.

History: En. Sec. 1, Ch. 172, L. 1937.

Collateral References
Elections 108.
29 C.J.S. Elections § 48.

References

Wilson v. Hoisington, 110 M 20, 22, 98 P 2d 369.

23-518. (570) Cancellation of registration cards, when. The county clerk must cancel any registry card in the following cases:

1. At the request of the party registered.

2. When he has personal knowledge of the death or removal from the county of the person registered, or when duly authenticated certificate of the death of any elector is filed in the names of vital statistics in his office.

- 3. When there is presented and filed with the county clerk the separate affidavit of three qualified registered electors residing within the precinct, which affidavit shall give the name of such elector, his registry number and his residence, and which affidavit shall show that of the personal knowledge of the affiant, that any person registered does not reside or has removed from the place designated as the residence of such elector.
 - 4. When the insanity of the elector is legally established.
- 5. Upon the production of a certified copy of a final judgment of conviction of any elector of felony.
- 6. Upon the production of a certified copy of the judgment of any court

directing the cancellation to be made.

7. Upon the cancellation of the registration of any elector as herein provided, the county clerk shall immediately remove from the official register herein provided for the registry of voters and shall deface the name of

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such elector on the official register by drawing a line through said entry in red ink and the county clerk shall mark the registry card of such elector across the face thereof in red ink with the word "canceled" and shall place such canceled cards with the "canceled file," as provided for in section 23-511.

All persons whose names are so removed, except as provided in section 23-517, and stricken from the said registration books, card indexes, and register of electors, shall within forty-eight hours thereafter, be notified by the county clerk in writing of such removal, by sending a notice to such person to his or her post-office address, as appearing on such registration books, card indexes, and register of electors. If any persons, whose names are so removed, can and do prove to the county clerk that they are in fact citizens of the United States and otherwise qualified to vote, as provided by law of the state of Montana, then, and in that case, they shall be entitled to reregister as voters.

History: En. Sec. 19, Ch. 113, L. 1911; amd. Sec. 19, Ch. 74, L. 1913; amd. Sec. 20, Ch. 122, L. 1915; amd. Sec. 4, Ch. 97, L. 1919; re-en. Sec. 570, R. C. M. 1921; amd. Sec. 2, Ch. 172, L. 1937.

Collateral References
Elections©=108.
29 C.J.S. Elections § 48.

23-519. (571) Compensation of county clerks. The county clerks shall receive, for the use and benefit of the county, from every city or town, or from every school district of the first class, (to which the precinct registers referred to in the last section have been furnished), the sum of three (\$0.03) cents for each and every name entered in such precinct registers, and in addition he shall receive in like manner the amount of the actual expense incurred in printing and posting the lists of electors, and in publishing the notices required by this law, and any other expense incurred on account of any such municipal or school district election. It shall be the duty of the city or town council, or board of school trustees, to order a warrant drawn for such sum as may be due to the county clerk under the provisions of this section, within thirty (30) days after the presentation of the account to them by said county clerk, provided, however, that in event of the election of candidates at municipal primary elections, as provided for in section 11-3113, and no general municipal election is required to be held, the county clerk shall prepare no precinct registers for such general municipal election and shall make no charge therefor; provided further, that in elections of school districts of the first class if only as many candidates are nominated as there are vacancies to be filled, the county clerk shall furnish no precinct registers and make no charge therefor to such school district.

It shall be the duty of the city clerk or the clerk of the school district to notify the county clerk in such case as above-mentioned, where no precinct registers are required, immediately after the facts become known to the city council or the board of trustees of the school district, which makes unnecessary the furnishing of such precinct registers.

History: En. Sec. 29, Ch. 113, L. 1911; amd. Sec. 29, Ch. 74, L. 1913; amd. Sec. 21, Ch. 122, L. 1915; re-en. Sec. 571, R. C. M. 1921; amd. Sec. 1, Ch. 71, L. 1935; amd. Sec. 3, Ch. 64, L. 1959.

Compiler's Note

The words "last section" appearing in the first paragraph of this section apparently refer to section 23-515.

References

Weber v. City of Helena, 89 M 109, 112, 297 P 455.

Collateral References

Counties 578 (1); Elections 212. 20 C.J.S. Counties 117; 29 C.J.S. Elections 197.

23-520. (572) Copies of precinct registers. The county clerk shall furnish to any person or persons who in writing may so request, a copy of the official precinct registers of any county, city or school district precinct, and upon delivery thereof shall charge and collect for the use and benefit of the county the sum of five cents for each and every name entered in such official precinct register.

History: En. Sec. 30, Ch. 113, L. 1911; amd. Sec. 30, Ch. 74, L. 1913; amd. Sec. 22, Ch. 122, L. 1915; re-en. Sec. 572, R. C. M. 1921.

Collateral References

Elections 111. 29 C.J.S. Elections § 50.

23-521. (573) Challenges and action to be taken thereon. At any time not later than the tenth day prior to any election, a challenge may be filed with the county clerk, signed by a qualified elector in writing, and duly verified by the affidavit of the elector, that the elector designated therein is not entitled to register. Such affidavit shall state the grounds of challenge, objection and disqualification. The county clerk shall file the affidavit of challenge in his office as a record thereof. The county clerk must deliver a true and correct copy of any and all of such affidavits so filed, challenging the right of any elector to vote who has been so registered at the same time, and together with the copy of the precinct registers and check lists, and other papers required by this act to be delivered to the judges of election, as in this act provided, and he must write distinctly opposite to the name of any person to whose qualification as an elector objections may be thus made, the words, "to be challenged." It shall be the duty of the judges of election, if on election day such person who has been objected to and challenged applies to vote, to test, under oath, his qualifications. Notwithstanding the elector is registered, his right to vote may be challenged on the day of election by any qualified registered elector, orally stating, to the judges of election, the grounds of such objection or challenge to the right of any registered elector to vote.

It is the duty of the judges of election, when it appears that any elector offers to vote and is either challenged by a duly qualified registered elector, on election day, or if an affidavit of objection to the right of such elector to vote has been filed with the county clerk and the copy of the precinct registers furnished to the judges of election have endorsed thereon, opposite to the name of such elector, "to be challenged," to test the qualifications of the elector and ask any questions that such judges may deem proper, and shall compare the answers of the elector to such questions with the entries in the precinct register books, and if it be found that said elector is disqualified, or that the answers given by such elector to the questions propounded by the judges do not correspond to the entry in the precinct registers, or that said elector is disqualified from any cause under the law, or if he refuses to take an oath as to his qualifications, he shall not be permitted to vote. The judges of election, in their discretion, may require such elector to produce before them one or more

freeholders of the county, as they may deem necessary, and have them examined under oath as to the qualifications of the elector.

History: En. Sec. 20, Ch. 113, L. 1911; amd. Sec. 20, Ch. 74, L. 1913; amd. Sec. 23, Ch. 122, L. 1915; re-en. Sec. 573, R. C. M. 1921.

References

Weber v. City of Helena, 89 M 109, 125, 297 P 455.

Collateral References

Elections 223. 29 C.J.S. Elections § 209.

- 23-522. (574) Residence, rules for determining. For the purpose of registration or voting, the place of residence of any person must be governed by the following rules as far as they are applicable:
- 1. That place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.
- 2. A person must not be held to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, or of this state, nor while a student at any institution of learning, nor while kept at any almshouse or other asylum at the public expense, nor while confined in any public prison, nor while residing on any military reservation.
- 3. No soldier, seaman, or marine in the army or navy of the United States shall be deemed a resident of this state in consequence of being stationed at any military or naval place within the same. No person shall be deemed to have acquired a residence in the state of Montana by reason of being employed or stationed at any United States Civilian Conservation Corps Camp within the state of Montana or at any transient camp maintained for relief purposes by the government of the United States within the state of Montana.
- 4. A person must not be considered to have lost his residence who leaves his home to go into another state, or other district of this state, for temporary purposes merely with the intention of returning, provided he has not exercised the right of the election franchise in said state or district.
- 5. A person must not be considered to have gained a residence in any county into which he comes for temporary purposes merely without the intention of making such county his home.
- 6. If a person removes to another state with the intention of making it his residence, he loses his residence in this state.
- 7. If a person removes to another state with the intention of remaining there for an indefinite time, and as a place of present residence, he loses his residence in this state, notwithstanding he entertains an intention of returning at some future period.
- 8. The place where a man's family resides is presumed his place of residence, but any man who takes up or continues his abode with the intention of remaining, or a place other than where his family resides, must be regarded as a resident of the place where he so abides.
- 9. A change of residence can only be made by the act of removal joined with intent to remain in another place. There can only be one residence. A residence cannot be lost until another is gained.

10. The term of residence must be computed by including the day of election.

History: En. Sec. 21, Ch. 113, L. 1911; amd. Sec. 21, Ch. 74, L. 1913; amd. Sec. 24, Ch. 122, L. 1915; amd. Sec. 1, Ch. 58, L. 1919; re-en. Sec. 574, R. C. M. 1921; amd. Sec. 1, Ch. 25, L. 1935. Cal. Pol. C. Sec. 1239.

Acts and Intent of Voter

The residence of a voter is to be determined from his acts and intent; but this fact, like any other fact involved in a civil action or proceeding, may be established by circumstantial evidence, and any declarations of the voter touching the subject, if a part of the res gestae, or any declarations in disparagement of his right to vote, if made at or before the election, may be received in evidence. Sommers v. Gould, 53 M 538, 544, 165 P 599.

Inapplicable to Licensing of Automobiles

This section, prescribing the conditions

determining the right to vote with respect to residence of the voter, had no bearing upon the situs of one's property (an automobile) or the ownership thereof for purpose of taxation, or licensing. Valley County v. Thomas, 109 M 345, 386, 97 P 2d 345.

Presumption

Subdivision 8 of this section is in reality a rule of evidence. Carwile v. Jones, 38 M 590, 602, 101 P 153.

References

Stephens v. Nacey, 49 M 230, 237, 141 P 649; State ex rel. Johnson v. Kassing, 74 M 25, 30, 238 P 582; Wilson v. Hoisington, 110 M 20, 24, 98 P 2d 369.

Collateral References

Elections 72. 29 C.J.S. Elections § 20. 25 Am. Jur. 2d 758, Elections, § 66.

23-523. (575) Certificates of naturalization, presentation to registrar. When a naturalized citizen applies for registration his certificate of naturalization, or a certified copy thereof, must be produced and stamped, or written in ink by the registry agent, with such registry agent's name and the year and day and county where presented; but if it satisfactorily appears to the registry agent, by the affidavit of the applicant (and the affidavit of one or more credible electors as to the credibility of such applicant when deemed necessary), that his certificate of naturalization, or a certified copy thereof, is lost or destroyed, or beyond the reach of the applicant for the time being, said registry agent must register the name of said applicant, unless he is by law otherwise disqualified; but in case of failure to produce the certificate of naturalization, or a certified copy thereof, the registry agent must propound the following questions:

- 1. In what year did you come to the United States?
- 2. In what state or territory, county, court, and year were you finally admitted to citizenship?
- 3. Where did you last see your certificate of naturalization, or a certified copy thereof?

History: En. Sec. 22, Ch. 113, L. 1911; amd. Sec. 22, Ch. 74, L. 1913; amd. Sec. 25, Ch. 122, L. 1915; re-en. Sec. 575, R. C. M. 1921.

Collateral References

Elections 106. 29 C.J.S. Elections § 46.

23-524. (576) Voter to sign precinct register books. The judges of election in each precinct, at every general or special election, shall, in the precinct register book, which shall be certified to them by the county clerk, mark a cross (X) upon the line opposite to the name of the elector, before any elector is permitted to vote the judges of election shall require the elector to sign his name upon one of the precinct register books, designated by the county clerk for that purpose, and in a column reserved in the said precinct books for the signature of electors. If the elector is

not able to sign his name he shall be required by the judges to produce two freeholders who shall make an affidavit before the judges of election, or one of them, in substantially the following form:

State of Montana, County of

History: En. Sec. 26, Ch. 113, L. 1911; amd. Sec. 26, Ch. 74, L. 1913; amd. Sec. 26, Ch. 122, L. 1915; re-en. Sec. 576, R. C. M. 1921.

Failure To Sign

Held, that failure of the election judges of a precinct to require the electors to sign the registry books before voting at a primary election, was the fault of the judges and not of the electors, and that therefore their votes were legal and properly counted. Thompson v. Chapin, 64 M 376, 383, 209 P 1060.

Collateral References
Elections 212.
29 C.J.S. Elections \$ 197.

23-525. (577) Compelling entry of names in great register. In any action or proceeding instituted in a district court to compel the county clerk to make and enter the name of any elector in the precinct register, as many persons may be joined as plaintiffs for cause of action and as many persons as there are causes of action against may be joined as defendants.

History: En. Sec. 32, Ch. 113, L. 1911; re-en. Sec. 32, Ch. 74, L. 1913; re-en. Sec. 27, Ch. 122, L. 1915; re-en. Sec. 577, R. C. M. 1921.

Collateral References
Elections©=107.
29 C.J.S. Elections § 46.

23-526. (578) Name of voter must appear in copy of register—identification of voter. No person shall be entitled to vote at any election mentioned in this act unless his name shall, on the day of election, appear in the copy of the official precinct register furnished by the county clerk to the judges of election, and the fact that his name so appears in the copy of the precinct register shall be prima facie evidence of his right to vote; provided, that when the judges shall have good reason to believe, or when they shall be informed by a qualified elector that the person offering to vote is not the person who was so registered in that name, the vote of such person shall not be received until he shall have proved his identity as the person who was registered in that name by the oath of two reputable freeholders within the precinct in which such elector is registered.

History: En. Sec. 35, Ch. 113, L. 1911; amd. Sec. 35, Ch. 74, L. 1913; amd. Sec. 28, Ch. 122, L. 1915; re-en. Sec. 578, R. C. M. 1921; amd. Sec. 1, Ch. 139, L. 1967.

Collateral References Elections 118. 29 C.J.S. Elections § 38.

23-527. (579) Omission of name from precinct registers—remedy. Any elector whose name is erroneously omitted from any precinct register may apply for and secure from the county clerk a certificate of such error, and stating the precinct in which such elector is entitled to vote, and upon the presentation of such certificate to the judges of election in such precinct, the said elector shall be entitled to vote in the same manner as if his name had appeared upon the precinct register. Such certificate shall be marked "voted" by the judges, and shall be returned by them with the precinct register.

History: En. Sec. 29, Ch. 122, L. 1915; re-en. Sec. 579, R. C. M. 1921; amd. Sec. 4, Ch. 64, L. 1959.

23-528. (580) Authority of deputy county clerk. Wherever in this act the word "county clerk" appears, it shall be construed as extending and giving authority to any regularly appointed deputy county clerk.

History: En. Sec. 36, Ch. 113, L. 1911; re-en. Sec. 36, Ch. 74, L. 1913; re-en. Sec. 30, Ch. 122, L. 1915; re-en. Sec. 580, R. C. M. 1921.

Collateral References
Counties \$\infty 82.
20 C.J.S. Counties \$ 133.

23-529. (581) "Elector" defined. The word "elector" as used in this law, whether used with or without the masculine pronoun, shall apply equally to male and female electors.

History: En. Sec. 31, Ch. 122, L. 1915; re-en. Sec. 581, R. C. M. 1921.

Collateral References Elections © 63-65. 29 C.J. S. Elections § 30.

23-530. (582) "Election" defined. The word "election," as used in this law, where not otherwise qualified, shall be taken to apply to general, special, primary nominating, and municipal elections, and to elections in school districts.

History: En. Sec. 32, Ch. 122, L. 1915; re-en. Sec. 582, R. C. M. 1921; amd. Sec. 2, Ch. 139, L. 1967.

Chapin, 64 M 376, 384, 209 P 1060; Weber v. City of Helena, 89 M 109, 117, 297 P 455.

References

State ex rel. Cryderman v. Wienrich, 54 M 390, 399, 170 P 942; Thompson v.

Collateral References Elections©31, 32. 29 C.J.S. Elections § 66.

23-531. (583) Violation of act, penalty for. Any person or persons, or any officer of any county, city or town, or school district, who, under the provisions of this act, are required to perform any duty, who shall willfully or knowingly fail, refuse, or neglect to perform such duty, or to comply with the provisions of this act, shall, upon conviction, be fined in the sum of not less than three hundred dollars, nor more than one thousand dollars, or by imprisonment in the county jail for a period of not less than three months and no more than one year. Upon the conviction of any officer of the violation of the provisions of this act, the judge of the district court hearing such proceeding shall, at the time of rendering judgment of

conviction, include in such order of conviction an order of the court that such officer be removed from office.

History: En. Sec. 37, Ch. 113, L. 1911; re-en. Sec. 37, Ch. 74, L. 1913; re-en. Sec. 33, Ch. 122, L. 1915; re-en. Sec. 583, R. C. M. 1921.

Collateral References
Elections 309.
29 C.J.S. Elections §§ 324, 334.

23-532. (584) Challenging of elector and administration of oath. If any person offering to vote at any primary election be challenged by a judge or any qualified elector at said election, as to his right to vote thereat, an oath shall be administered to him by one of the judges that he will truly answer all questions touching his right to vote at such election, and if it appear that he is not a qualified voter under the provisions of this act, his vote shall be rejected; and if any person whose vote shall be so rejected shall offer to vote at the same election, at any other polling place, he shall be deemed guilty of a misdemeanor.

History: En. Sec. 38, Ch. 113, L. 1911; re-en. Sec. 38, Ch. 74, L. 1913; re-en. Sec. 34, Ch. 122, L. 1915; re-en. Sec. 584, R. C. M. 1921.

Collateral References Elections ≈ 223. 29 C.J.S. Elections § 209. 26 Am. Jur. 2d 67, Elections, § 237.

23-533. (585) Acts constituting violation of law—penalty. Any person who shall make false answers, either for himself or another, or shall violate or attempt to violate any of the provisions of this act, or knowingly encourage another to violate the same, or any public officer or officers, or other persons upon whom any duty is imposed by this act, or any of its provisions, who shall willfully neglect such duty, or shall willfully perform it in such way as to hinder the objects and purposes of this act, shall, excepting where some penalty is provided by the terms of this act, be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for a period of not less than one year or more than fourteen years, and if such person be a public officer, shall also forfeit his office.

History: En. Sec. 39, Ch. 113, L. 1911; re-en. Sec. 39, Ch. 74, L. 1913; re-en. Sec. 35, Ch. 122, L. 1915; re-en. Sec. 585, R. C. M. 1921.

Collateral References Elections \$309, 318. 29 C.J.S. Elections §§ 324, 331, 334.

23-534. (586) County commissioners to supply clerk with help. It shall be the duty of the board of county commissioners of each county to provide the county clerk thereof with sufficient help to enable him to properly perform the duties imposed upon him by this act, and the cost of the stationery, printing, publishing, and posting to be furnished or procured by the county clerk by the provisions of this law shall be a proper charge upon the county.

History: En. Sec. 40, Ch. 74, L. 1913; amd. Sec. 36, Ch. 122, L. 1915; re-en. Sec. 586, R. C. M. 1921.

Collateral References Counties©=134. 20 C.J.S. Counties § 209.

CHAPTER 6

JUDGES AND CLERKS OF ELECTIONS

Section 23-601. Judges of election—how appointed. 23-602. Number of judges to be appointed. 23-603. Number appointed in new precincts.

23-604. Not more than a majority to be from any one political party.

23-604.1. Candidates and relatives ineligible.

23-604.2. School district elections—precinct elections.

23-605. Compensation of election officers.
23-606. Clerk to give notice to judges of appointment—electors to elect judges

in case of vacancy.

23-607. Judges to choose clerks and to serve until others appointed.

23-608. Clerks to mail to judges notices of election—form of notices.

23-609. Notices to be posted by the judges.

23-610. Oath of judges and clerk.

23-611. Judges and clerks may administer oaths. 23-612. Instructions of judges of elections.

(587) Judges of election — how appointed. The board of county commissioners of the several counties at the regular session next preceding a general election, must appoint five judges of election for each precinct in which the voters therein, by the last registration, were two hundred or more and three judges of election for each precinct in which such registration was less than two hundred, provided that in all election precincts in which there were east three hundred and fifty or more ballots in the last general election or in which the board of county commissioners believe that as many ballots as three hundred and fifty will be cast in the next general election, the board of county commissioners may appoint a second or additional board consisting of five judges for each such precinct, who shall possess the same qualifications as the first board herein mentioned. The judges constituting the second board for each precinct. if such second board shall have been appointed, shall meet at their respective polling places, as designated in the order appointing them, at the time the polls are closed and at said hour or as soon as the first board has completed their duties in regard to the voting, the second board shall take charge of the ballot boxes containing the ballots and shall proceed to count and tabulate the ballots cast as they shall find them deposited in the ballot boxes. In the event that the count is not completed by eight o'clock a. m. of the next following day, the first board shall reconvene and relieve the second board and continue said count until eight o'clock p. m., when if the count is not yet completed, the second board shall reconvene and again relieve the first board, and so, alternately until said board shall have fully completed the count and certified the returns. The judges constituting the several boards shall number the ballots and count the tallies upon the tally sheets and so indicate upon the tally sheets as to distinctly show the work of each board separately. The board completing the count shall make such certification of returns as is required by law.

The board of county commissioners, notwithstanding the foregoing provisions in this section contained, may however, appoint a single board of judges for each precinct in the county, when, in the judgment of said board of county commissioners, a second or additional board is unnecessary.

History: En. Sec. 1260, Pol. C. 1895; re-en. Sec. 500, Rev. C. 1907; re-en. Sec. 587, R. C. M. 1921; amd. Sec. 1, Ch. 43, L. 1923; amd. Sec. 1, Ch. 61, L. 1937; amd. Sec. 1, Ch. 40, L. 1943.

Collateral References Elections 51, 241 et seq.

29 C.J.S. Elections §§ 57-59, 61, 62, 224 et seq.

Immunity of election officer from criminal arrest. 1 ALR 1160.

Result of election as affected by lack of title or by defective title of election officers. 1 ALR 1535.

23-602. (588) Number of judges to be appointed. The board of county commissioners, notwithstanding the registration, may appoint five judges of each precinct in which upon information obtained by them they have reason to believe contains two hundred voters or more and three judges of election in precincts which upon information obtained by them, they have reason to believe was less than two hundred.

History: En. Sec. 1261, Pol. C. 1895; re-en. Sec. 501, Rev. C. 1907; re-en. Sec. 588, 1923.

23-603. (589) Number appointed in new precincts. In any new precinct established, the board of county commissioners must, in like manner, appoint five or three judges of election, according to the estimated number of voters therein, as required by the two next preceding sections.

History: En. Sec. 1262, Pol. C. 1895; re-en. Sec. 502, Rev. C. 1907; re-en. Sec. 589, R. C. M. 1921.

23-604. (590) Not more than a majority to be from any one political party. In making the appointment of judges of election, such judges must be chosen from a list of qualified electors to be submitted by the county central committee of the two (2) major political parties in the county at least thirty-five (35) days prior to the regular session of the board of county commissioners, next preceding a primary nominating election, a general or special election, such list to contain at least twice the number of judges to be appointed and not more than a majority of such judges must be appointed from any one political party for each precinct and such appointee shall be deemed to belong to the political party upon whose list his name appears, provided that the board of county commissioners may appoint such judges as in case of vacancy or in case any major political party fails to submit a list of judges within the time herein provided.

History: En. Sec. 1263, Pol. C. 1895; re-en. Sec. 503, Rev. C. 1907; re-en. Sec. 590, R. C. M. 1921; amd. Sec. 1, Ch. 85, L. 1941. Cal. Pol. C. Sec. 1143. Collateral References
Elections 52.
29 C.J.S. Elections § 60.

23-604.1. Candidates and relatives ineligible. No person shall be appointed to serve as an election judge or election clerk who is a candidate, spouse of a candidate or one who is related to a candidate for office at such election within the second degree of consanguinity.

History: En. Sec. 1, Ch. 99, L. 1961.

- 23-604.2. School district elections—precinct elections. The provisions of section 23-604.1 and this section shall not apply to school district elections nor to candidates for precinct committeeman and committeewoman. History: En. Sec. 2, Ch. 99, L. 1961.
- 23-605. (591) Compensation of election officers. The compensation of members of boards of election, including judges and clerks, shall be fixed by the board of county commissioners at not to exceed one dollar twenty-five cents (\$1.25) per hour for the time actually on duty, and must be audited by the board of county commissioners and paid out of the county treasury.

History: En. Sec. 1173, Pol. C. 1895; re-en. Sec. 459, Rev. C. 1907; amd. Sec. 1, Ch. 101, L. 1917; re-en. Sec. 591, R. C. M. 1921; amd. Sec. 1, Ch. 49, L. 1945; amd. Sec. 1, Ch. 117, L. 1947; amd. Sec. 1,

Ch. 12, L. 1951; amd. Sec. 1, Ch. 46, L. 1963. Cal. Pol. C. Sec. 1072.

Collateral References
Elections 53,
29 C.J.S. Elections § 63.

23-606. (592) Clerk to give notice to judges of appointment—electors to elect judges in case of vacancy. The clerk of the board must make out and forward by mail, immediately after the appointment of the judges, a notice thereof in writing, directed to each of them. In case there is no post office in any one or more of the precincts in any county, the clerk must forward notices of such appointment by registered mail to the post office nearest such precinct, directed to the judges aforesaid. If, in any of the precincts, any of the judges refuse or neglect to serve, the electors of such precinct may elect a judge or judges to fill vacancies on the morning of the election, to serve at such election.

History: En. Sec. 1264, Pol. C. 1895; re-en. Sec. 504, Rev. C. 1907; re-en. Sec. 592, R. C. M. 1921.

23-607. (593) Judges to choose clerks and to serve until others appointed. The judges may, whenever they deem it necessary for the prompt and efficient conduct of the election within their respective polling places, appoint two persons having the same qualifications as themselves to act as clerks of the election. The judges shall continue to be judges of all elections to be held in their respective precincts until other judges are appointed; and the clerks of election continue to act as such during the pleasure of the judges of election, and the board of county commissioners must from time to time fill vacancies which may occur in the offices of judges of election in any precinct within their respective counties.

History: En. Sec. 6, p. 461, Cod. Stat. 1871; re-en. Sec. 6, p. 71, L. 1876; re-en. Sec. 520, 5th Div. Rev. Stat. 1879; re-en. Sec. 1012, 5th Div. Comp. Stat. 1887;

re-en. Sec. 1265, Pol. C. 1895; re-en. Sec. 505, Rev. C. 1907; re-en. Sec. 593, R. C. M. 1921; amd. Sec. 2, Ch. 40, L. 1943.

23-608. (594) Clerks to mail to judges notices of election—form of notices. The clerks of the several boards of county commissioners must, at least twenty (20) days before any general election, make and forward by mail to such judge or judges as are designated by the county commissioners, three written notices for each precinct, said notices to be substantially as follows:

Notice is hereby given that on the first Tuesday after the first Monday of November, 19..., at the house, in the county of, an election will be held for (naming the offices to be filled, including electors of president and vice-president, a representative in Congress, state, county and township officers), and for the determination of the following questions (naming them), the polls of which election will be open at 8:00 a. m. and continuing open until 8:00 p. m. of the same day.

Dated this day of, A.D. 19.....

Signed A. B., clerk of the board of county commissioners.

History: Ap. p. Sec. 7, p. 461, Cod. en. Sec. 521, 5th Div. Rev. Stat. 1879; re-Stat. 1871; re-en. Sec. 7, p. 71, L. 1876; re-en. Sec. 1013, 5th Div. Comp. Stat. 1887;

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amd. Sec. 1266, Pol. C. 1895; re-en. Sec. 506, Rev. C. 1907; re-en. Sec. 594, R. C. M. 1921; amd. Sec. 2, Ch. 167, L. 1945; amd. Sec. 1, Ch. 14, L. 1957. Collateral References
Elections 40, 41.
29 C.J.S. Elections §§ 72, 73.

23-609. (595) Notices to be posted by the judges. The judges to whom such notice is directed, as provided in the next preceding section, must cause to be put up in three of the most public places in each precinct the notices of election in such precinct, at least ten days previous to the time of holding any general election, which notices must be posted as follows: One at the house where the election is authorized to be held, and the others at the two most public and suitable places in the precinct.

History: Ap. p. Sec. 8, p. 72, L. 1876; re-en. Sec. 522, 5th Div. Rev. Stat. 1879; re-en. Sec. 1014, 5th Div. Comp. Stat. 1887; amd. Sec. 1267, Pol. C. 1895; re-en. Sec. 507, Rev. C. 1907; re-en. Sec. 595, R. C. M. 1921.

Collateral References
Elections \$\infty 42.
29 C.J.S. Elections \\$ 74.

23-610. (596) Oath of judges and clerk. Previous to votes being taken, the judges and clerks of election must take and subscribe the official oath prescribed by the constitution. It is lawful for the judges of election, and they are hereby empowered, to administer the oath to each other, and to the clerks of the election.

History: En. Sec. 1268, Pol. C. 1895; re-en. Sec. 508, Rev. C. 1907; re-en. Sec. 596, R. C. M. 1921. Cal. Pol. C. Sec. 1148.

23-611. (597) Judges and clerks may administer oaths. Any member of the board, or either clerk thereof, may administer and certify oaths required to be administered during the progress of an election.

History: En. Sec. 1269, Pol. C. 1895; re-en. Sec. 509, Rev. C. 1907; re-en. Sec. 597, R. C. M. 1921.

Collateral References
Elections 54.
29 C.J.S. Elections § 57.

23-612. Instructions of judges of elections. Before each election, general or primary, all judges appointed to act at said election, who do not possess a certificate of instruction as provided for in this act shall be instructed by a person delegated by the board of county commissioners in regard to the powers, duties, and liabilities imposed upon election judges by the election laws of the state of Montana. For the purpose of giving such instruction, the delegate of the board of county commissioners shall call such meeting or meetings of the judges of election as shall be necessary. Each judge of election shall attend such meeting or meetings and receive at least two (2) hours of instruction, and as compensation for the time spent in receiving such instruction, each judge that shall serve in the election shall receive the sum of one dollar (\$1.00) per hour of instruction, to be paid to him at the same time and in the same manner as compensation is paid to him for his or her services on election day.

Upon the completion of the two (2) hours of instruction, the judge shall receive a certificate from the person delegated by the board of county commissioners from whom he or she has received instruction, that the instruction has been completed, provided that no certificate of instruction shall be valid for a period of greater than two (2) years. No person shall serve

as a judge of election unless this certificate has been received, provided, however, that this shall not prevent the appointment of a judge of election to fill a vacancy in an emergency. Notice of place and time of instruction of the political judges must be given by the board of county commissioners to the county chairman of the two major political parties in the county.

History: En. Sec. 1, Ch. 210, L. 1957.

CHAPTER 7

ELECTION SUPPLIES

Section 23-701. County commissioners to furnish pollbooks.

23-702. Form of pollbook.

23-703. Want of form not to vitiate.

23-704. County commissioners to have blanks prepared.

23-705. Clerk to deliver ballots and stamps to judges of election-stamp, what to contain.

23-706. Ballot boxes.

23-707. Size of the opening of the ballot box.

23-708. Ballot box to be exhibited.

23-709. County clerk to have printed instructions to the electors.

23-710. Forms for transmission of election returns. 23-711. Copying total vote east for each candidate.
23-712. Posting and mailing blanks.
23-713. Penalty for failure to comply with law.

23-701. (598) County commissioners to furnish pollbooks. The board of county commissioners of each county must furnish for the several election precincts in each county pollbooks after the forms hereinafter prescribed.

History: En. Sec. 1300, Pol. C. 1895; re-en. Sec. 517, Rev. C. 1907; re-en. Sec. 598, R. C. M. 1921.

Collateral References

Elections 212. 29 C.J.S. Elections § 197.

Cross-Reference

County commissioners to furnish pollbooks, sec. 16-1156.

23-702. (600) Form of pollbook. The following is the form of pollbooks to be kept in duplicate by the judges and clerks of election:

Pollbook of Precinct No.

Number and names of electors voting.

No.	Name.	No.	Name.	No.	Name.
				* VANAGOLICA	1

Total number of votes cast at precinct No.

We, the undersigned, judges and clerks of an election held at precinct No., in the county of, in the state of Montana, on the day of, 19....., having first been severally sworn according to law, hereby certify that the foregoing is a true statement of the number and names of the persons voting at said precinct at said election, and that the following named persons received the number

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of votes annexed to their respective names for the following described offices to wit:

Governor.	Members of Legislative Assembly.				
A. B.,	Senate. House of Representatives E. F., Votes G. H., Votes				
Certified and sign					
	Judges.				

History: En. Sec. 1302, Pol. C. 1895; re-en. Sec. 519, Rev. C. 1907; re-en. Sec. 600, R. C. M. 1921. Cal. Pol. C. Sec. 1174. 23-703. (601) Want of form not to vitiate. No pollbook or certificate returned from any election precinct must be set aside or rejected for want of form, nor on account of its not being strictly in accordance with the di-

References

Stephens v. Nacey, 47 M 479, 485, 133 P

rections of this chapter, if it can be satisfactorily understood. History: En. Sec. 1303, Pol. C. 1895; re-en. Sec. 520, Rev. C. 1907; re-en. Sec. 601, R. C. M. 1921. Cal. Pol. C. Sec. 1175. References Stephens v. Nacey, 47 M 479, 485, 133

(602) County commissioners to have blanks prepared. necessary printed blanks for precinct registers, pollbooks, tally sheets, lists of electors, tickets, and returns, together with envelopes in which to enclose the returns, must be furnished by the board of county commissioners to the officers of each election precinct at the expense of the county.

History: En. Sec. 1174, Pol. C. 1895; 602. R. C. M. 1921: amd. Sec. 5. Ch. 64. re-en. Sec. 460, Rev. C. 1907; re-en. Sec. L. 1959.

23-705. (603) Clerk to deliver ballots and stamps to judges of election -stamp, what to contain. Before the opening of the polls, the county clerk, or the city clerk in the case of municipal elections, must deliver to the judges of election of each election precinct which is within the county (or within the municipality in case of municipal election) and in which the election is to be held, at the polling place of the precinct, the proper number of election ballots as provided for in section 23-1117. He must also deliver to said judges a rubber or other stamp, with ink pad, for the purpose of stamping or designating the official ballots as hereinafter provided. Said stamp must contain the words "Official Ballot," the name or number of the election precinct, the name of the county, the date of the election, the name and official designation of the clerk who furnishes the ballots. The judge of election to whom the stamps and ballots are given pursuant to this section must be the same person who may be designated by the commissioners to post the notices required by section 23-608. But in case it be

impracticable to deliver such stamps and ballots to such judge then they may be delivered to some other one of the judges of election.

History: Ap. p. Sec. 20, p. 140, L. 1889; amd. Sec. 1356, Pol. C. 1895; re-en. Sec. 547, Rev. C. 1907; re-en. Sec. 603, R. C. M. 1921.

ton, 53 M 388, 391, 164 P 537; State ex rel. Riley v. District Court, 103 M 576, 588, 64 P 2d 115.

References

State ex rel. Brooks v. Farnsham, 19 M 273, 286, 48 P 1; Harrington v. CrichCollateral References Elections \$\infty\$ 163. 29 C.J.S. Elections \\$ 155.

23-706. (604) Ballot boxes. There shall be provided at the expense of the county, for each polling precinct, a substantial ballot box or canvas pouch with a secure lock and key for the ballots and detached stubs as hereinafter provided for. There shall be one opening, and no more in such box or canvas pouch, of sufficient size to admit a single folded ballot. The adoption of the canvas pouch to be used instead of the ballot box, in any precinct, shall be optional with the commissioners of each county, but in such precincts where pouches are so adopted, the pouches shall be returned to the county clerk together with the other election returns, as by law provided.

History: Ap. p. Sec. 1270, Pol. C. 1895; amd. Sec. 1, Ch. 88, L. 1907; re-en. Sec. 510, Rev. C. 1907; re-en. Sec. 604, R. C. M. 1921.

Collateral References
Elections 217.
29 C.J.S. Elections §§ 194, 204.
26 Am. Jur. 2d 64, Elections, § 231.

23-707. (605) Size of the opening of the ballot box. There must be an opening in the lid of such box of no larger size than shall be sufficient to admit a single folded ballot.

History: En. Sec. 18, p. 463, Cod. Stat. 1871; re-en. Sec. 17, p. 74, L. 1876; re-en. Sec. 531, 5th Div. Rev. Stat. 1879; re-en. Sec. 1023, 5th Div. Comp. Stat. 1887; re-

en. Sec. 1271, Pol. C. 1895; re-en. Sec. 511, Rev. C. 1907; re-en. Sec. 605, R. C. M. 1921.

23-708. (606) Ballot box to be exhibited. Before receiving any ballots, the judges must, in the presence of any persons assembled at the polling place, open and exhibit the ballot box and remove any contents therefrom, and then close and lock the same, delivering the key to one of their members, and thereafter the ballot box must not be removed from the polling place or presence of the bystanders until all the ballots are counted, nor must it be opened until after the polls are finally closed.

History: Ap. p. Sec. 18, p. 463, Cod. Stat. 1871; re-en. Sec. 17, p. 74, L. 1876; re-en. Sec. 531, 5th Div. Rev. Stat. 1879; re-en. Sec. 1023, 5th Div. Comp. Stat. 1887;

amd. Sec. 1272, Pol. C. 1895; re-en. Sec. 512, Rev. C. 1907; re-en. Sec. 606, R. C. M. 1921. Cal. Pol. C. Sec. 1162.

23-709. (607) County clerk to have printed instructions to the electors. The county clerk of each county must cause to be printed in large type on cards, in the English language, instructions for the guidance of electors in preparing their ballots. He must furnish six cards to the judges of election in each election precinct, and one additional card for each fifty registered electors, or fractional part thereof, in the precinct, at the same time and in the same manner as the printed ballots. The judges of election must post not less than one of such cards in each place or compartment provided for the preparation of ballots, and not less than three of such

cards elsewhere in and about polling places upon the day of election. Said cards must be printed in large, clear type, and must contain full instructions to the voters as to what should be done, viz.:

1. To obtain ballots for voting.

2. To prepare the ballots for deposit in the ballot-boxes.

3. To obtain a new ballot in the place of one spoiled by accident or mistake. Said card must also contain a copy of sections 94-1407, 94-1411, 94-1412, 94-1413, 94-1414 and 94-1415. There must also be posted in each of the compartments, or booths, one of the official tickets, as provided in sections 23-1101 to 23-1116, without the official stamp, and not less than three such tickets posted elsewhere in and about the polling places upon the day of election.

History: En. Sec. 1273, Pol. C. 1895; re-en. Sec. 513, Rev. C. 1907; re-en. Sec. 607, R. C. M. 1921, Cal. Pol. C. Sec. 1207.

Collateral References
Elections©=216.
29 C.J.S. Elections § 205.

23-710. (608) Forms for transmission of election returns. In sending out election supplies to each precinct for each general election, it shall be the duty of the county clerk in each county to send with such supplies not less than six printed forms, with a return envelope, for the use of judges of election in transmitting election returns for public information. Said printed forms shall be in ballot form on tinted paper, and the name of each candidate and each proposition voted on shall be printed on said blank. Brief instructions for the use of said blank, as contained in this act, shall also be printed on said blank.

History: En. Sec. 1, Ch. 12, L. 1915; re-en. Sec. 608, R. C. M. 1921.

Purpose of Tinted Sheets

The sole purpose of the tinted sheets provided for by this section and sections 23-711 to 23-713, on which judges of election must summarize the result of the vote and cause a copy thereof to be posted at the polling place and one to be trans-

mitted to the county clerk, is to facilitate the publication of the results; they are not a part of the election returns and are not required to be transmitted to the clerk in sealed packages. Dubie v. Batani, 97 M 468, 478, 37 P 2d 662.

Collateral References
Elections©=247.
29 C.J.S. Elections § 229.

23-711. (609) Copying total vote cast for each candidate. As soon as all of the ballots have been counted in any precinct, it shall be the duty of the election judges to correctly copy the total vote cast for each candidate and the total vote cast for and against each proposition on the blanks furnished by the county clerk, as provided in the preceding section.

History: En. Sec. 2, Ch. 12, L. 1915; re-en. Sec. 609, R. C. M. 1921.

References

Dubie v. Batani, 97 M 468, 478, 37 P 2d 662.

23-712. (610) Posting and mailing blanks. One of said blanks, properly filled out, shall be posted forthwith at the polling place; and one copy, correctly filled out, shall be sent by mail or by messenger, when the same can be done without expense, to the county clerk. Said copy may be sent by the same messenger carrying the official election returns, but the same shall not be enclosed or sealed with the other returns.

History: En. Sec. 3, Ch. 12, L. 1915; re-en. Sec. 610, R. C. M. 1921.

References

Dubie v. Batani, 97 M 468, 478, 37 P 2d 662.

23-713. (611) Penalty for failure to comply with law. Any judge of election, or other officer, who shall fail or refuse to comply with the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding fifty dollars.

History: En. Sec. 4, Ch. 12, L. 1915; re-en. Sec. 611, R. C. M. 1921.

Collateral References

References

Elections 314. 29 C.J.S. Elections § 327.

Dubie v. Batani, 97 M 468, 478, 37 P 2d 662.

CHAPTER 8

NOMINATION OF CANDIDATES FOR SPECIAL ELECTIONS BY CONVENTION OR PRIMARY MEETINGS OR BY ELECTORS

Section 23-801. Convention or primary meeting defined-vacancies.

23-802. Certificates of nomination, what to contain.

23-803. Certificate, where filed.

23-804. Certificates of nomination otherwise made.

23-805. Certificate not to contain certain things—one person not to be nominated for more than one office.

23-806. Certificates to be preserved one year.

23-807. When certificates to be filed.

23-808. Nominees to pay prescribed filing fee. 23-809. Secretary of state to certify to county clerk names of persons nominated.

23-810. Declination of nomination-municipal elections. 23-811. Vacancies may be filled by further certificates.

Errors, how corrected. 23-812.

23-813. Qualification of voter at primary election.

23-814. Who entitled to vote.

23-815. Judges.

23-816. Clerk.

23-817. Challenges-oath-penalty.

Fraudulent voting or counting.

Unlawful interference. 23-819.

23-820. Penalties.

23-801. (612) Convention or primary meeting defined—vacancies. Any convention or primary meeting held for the purpose of making nominations to public office, or the number of electors required in this chapter, may nominate candidates for public office to be filled by election in the state. A convention or primary meeting within the meaning of this chapter is an organized assemblage of electors or delegates representing a political party or principle, and in the event a vacancy shall happen by death or resignation in the representation from any congressional district of the state of Montana in the house of representatives of the Congress of the United States, only the electors residing within such congressional district shall vote at any such convention or primary meeting held for the purpose of making nominations to fill such vacancy.

History: En. Sec. 2, p. 135, L. 1889; amd. Sec. 1310, Pol. C. 1895; re-en. Sec. 521, Rev. C. 1907; re-en. Sec. 612, R. C. M. 1921; amd. Sec. 1, Ch. 26, L. 1945. Cal. Pol. C. Sec. 1186.

Application of Section

The Primary Election Law (23-901 et seq.) applies to all situations where it can

be made reasonably operative. Where a county treasurer, elected in November, 1942 for a four-year term ending March 1, 1947, died after he had qualified and before commencement of the term for which he was elected, the appointee of the county commissioners under section 5, article XVI of the constitution would hold until next general election on November 7, 1944, and procedure under Primary Law (23-901 et seq. and section 5, article XVI of the constitution) is controlling. A vacancy occurring after the primary and prior to the general election or at any other inapplicable time authorizes nomination under this section or section 23-804, section 23-909 then not applying. LaBorde v. McGrath, 116 M 283, 286, 149 P 2d 913, distinguished in 117 M 160, 170, 157 P 2d 108 and 130 M 202, 208, 299 P 2d 446.

Nominees to be placed on ballot at special election to fill vacancy resulting from death of representative in Congress must be chosen pursuant to this section or section 23-804 and not by special nominating election. Bottomly v. Ford, 117 M 160, 167, 157 P 2d 108.

Assembly To Nominate Candidates Es-

sential

Where a call for a mass convention of electors stated that the object was to organize central committees opposed to corporate rule, and to give the voters of the state an opportunity to vote for men free from corporate control, but failed to state that the convention was to assemble to nominate candidates for any office whatever, it was not a call of the electors of the state to assemble and select candidates for public office. State ex rel. Athey v. Hays, 31 M 233, 236, 78 P 486.

A mass convention of electors can make nominations of candidates for public office only where such convention was called for that purpose. If the convention could not make such nominations because the call of the convention did not set forth such purpose, a committee appointed by the convention was without authority to make the nominations. State ex rel. Athey v. Hays, 31 M 233, 236, 78 P 486.

Convention Representation

Convention representation is a gathering of electors springing from the electors who compose a political party or adhere to a political principle. State ex rel. Metcalf v. Johnson, 18 M 548, 552, 46 P 533.

"Conventions" Defined

Under this section and sections 23-802, and 23-803, conventions are meant to be organized assemblages of electors or delegates fairly representing the entire body of electors of the political party which may lawfully vote for the candidates of any such convention. State ex rel. Woody v. Rotwitt, 18 M 502, 506, 507, 46 P 370.

The supreme court, without directly citing this section, defined a political convention as an organized assemblage of electors or delegates representing a political party or principle. State ex rel. Metcalf v. Johnson, 18 M 548, 552, 46 P 533.

District Comprising Two Counties

This section and sections 23-802 and 23-803, recognize systems of conventions and primary meetings held to nominate candidates for public office. Such conventions are meant to be organized assemblages of electors or delegates fairly repesenting the entire body of electors of the political party which may lawfully vote for the candidates of any such convention. Where, therefore, a judicial district comprises two counties, the nomination of a candidate for district judge by a political party at a county convention composed of delegates of that county alone, without the other having been represented or having an opportunity to participate in the proceedings, such action was a mere nullity. State ex rel. Woody v. Rotwitt, 18 M 502, 506, 46 P 370.

A mass meeting in one of two counties composing a judicial district, called without notice, except to those present at the final adjournment of a regular county convention, for the announced purpose of formulating a protest to the action of the convention, has no authority to name de-legates to represent the county in a state and judicial convention in place of those named by the regular county convention; and delegates named by such meeting, though recognized and seated by the state convention, have no authority to represent the county in the judicial convention, and a nomination made by it is invalid, because the electors of both counties are not represented. State ex rel. Scharnikow v. Hogan, 24 M 383, 392, 62 P 583. See also State ex rel. Gilchrist v. Weston, 27 M 185, 191, 70 P 519, 70 P 1134.

New Political Parties

Since the Initiative Primary Law (23-901 et seq.) was not enacted to prevent nominations but to subject them to public regulation and control as far as possible and did not repeal this section so far as it relates to political parties coming into existence after the holding of the primary election, this section was the only law under which the socialist party organized in September, 1922, could proceed to make its nominations. State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

Mills v. Stewart, 64 M 453, 464, 210 P 465.
Under chapter 7, Laws of 1927 (23909), a political party which did not cast
at least three per cent of the total vote
cast for representative in Congress at the
next preceding general election, or a new
party about to be formed, may make
nominations for public office by the convention system provided for by this section. State ex rel. Foster v. Mountjoy, 83
M 162, 168, 271 P 446.

Nomination by Political Club

Where a political club composed of four

hundred members nominated a county ticket at a meeting of some fifty members, and no call for a convention was ever made nor any person ever elected as a delegate to a convention, nor any notice given that a convention was to be held, such proceedings were not those of an organized assemblage of delegates representing a political party within the meaning of this section. State ex rel. Russel v. Tooker, 18 M 540, 543, 46 P 530, explained in 24 M 383, 392, 62 P 583.

Partisan Nominations

Partisan nominations of candidates for judicial offices are recognized by this section and sections 23-802, 23-803. State ex rel. Holliday v. O'Leary, 43 M 157, 167, 115 P 204.

Presidential Electors-Nomination

The nomination for presidential electors is a nomination for public office. State ex rel. Wheeler v. Stewart, 71 M 358, 363, 230 P 366.

Special Elections

Since the Primary Election Law (23-901 et seq.) is made applicable only to general elections, fails to provide for the nomination of candidates to be voted for at special elections, and does not repeal prior statutes on the latter subject, this section and section 23-804, are still in force, and therefore nomination of candidates to be voted for at special elections must be made pursuant to the provisions of either this section or section 59-707. State ex rel. Reibold v. Duncan, 55 M 380, 177 P 250, distinguished in 116 M 283, 291, 149 P 2d 913.

Validity of Nominations

Where it appeared that a convention was participated in by twenty-one electors of the county who appeared in response to personal invitation, and after acting as a county convention then proceeded to hold a state convention, no call for a state convention having ever been given or delegates elected to either convention, and no notice published throughout the state or county of the gathering of the new party, the nomination of a county ticket and presidential electors by such convention was a nullity. State ex rel. Metcalf v. Johnson, 18 M 548, 552, 46 P 533.

References

State ex rel. Mitchell v. District Court, 128 M 325, 275 P 2d 642, 647.

Collateral References

Elections \$= 125. 29 C.J.S. Elections §§ 91, 104. 25 Am. Jur. 2d 814, Elections, § 128.

Constitutionality of statute relating to power of committee or officials of political party. 62 ALR 924.

Extent of power of political party, committee or officer to exclude persons from participating in its primaries as voter or candidates. 70 ALR 1501; 88 ALR 473; 97 ALR 685 and 151 ALR 1121.

Political principles or affiliations as ground for refusal of government officials to take steps necessary to representation of party or candidate upon official ticket. 130 ALR 1471.

Personal liability of public officer for breach of duty in respect of election or primary election laws. 153 ALR 109.

23-802. (613) Certificates of nomination, what to contain. All nominations made by such convention or primary meeting must be certified as follows: The certificate of nomination, which must be in writing, must contain the name of each person nominated, his residence, his business, his business address, and the office for which he is named, and must designate, in not more than five words, the party or principle which such convention or primary meeting represents, and it must be signed by the presiding officer and secretary of such convention or primary meeting, who must add to their signatures their respective places of residence, their business, and business addresses. Such certificates must be delivered by the secretary or the president of such convention or primary meeting to the secretary of the state or to the county clerk, as in this chapter required.

History: En. Sec. 3, p. 136, L. 1889; re-en. Sec. 1311, Pol. C. 1895; re-en. Sec. 522, Rev. C. 1907; re-en. Sec. 613, R. C. M. 1921. Cal. Pol. C. Sec. 1187.

All Convention Nominations Included In One Certificate

Under this section all convention nominations of one party must be contained in

a single certificate, and a separate certificate for each nominee cannot be filed. State ex rel. Galen v. Hays, 31 M 227, 230, 78 P 301.

Purpose

The requirement of this section is evidently designed to guide the proper officer in printing the ballot, so that he may

group the candidates and distinguish them by this designation. State ex rel. Kennedy v. Martin, 24 M 403, 406, 62 P 588.

References

State ex rel. Mitchell v. District Court, 128 M 325, 275 P 2d 642, 647.

Collateral References

Elections \$38. 29 C.J.S. Elections \$135. 25 Am. Jur. 2d 833, Elections, \$141.

23-803. (614) Certificate, where filed. Certificates of nomination of candidates for the legislative assembly and for offices to be filled by the electors of the entire state, or of any division or district greater than a county, must be filed with the secretary of state. Certificates of nomination for county, township, and precinct officers must be filed with the clerks of the respective counties wherein the officers are to be elected. Certificates of nomination for municipal officers must be filed with the clerks of the respective municipal corporations wherein the officers are to be elected.

History: En. Sec. 4, p. 136, L. 1889; re-en. Sec. 1312, Pol. C. 1895; re-en. Sec. 523, Rev. C. 1907; re-en. Sec. 614, R. C. M. 1921; amd. Sec. 3, Ch. 194, L. 1967. Cal. Pol. C. Sec. 1189.

Candidate for District Judge

A district judge is a state officer, but there is no provision in this section requiring the certificate of nomination of such an officer from a district containing only a single county to be filed with the secretary of state. In this regard, therefore, there is no specific provision enjoining any duty upon this officer. In view of the policy of the statute and constitution, however, which appears to be that the nomination and election of officers in any county of the state shall be controlled exclusively by the electors therein and their local officers, the certificate of a candidate for district judge of a district containing only one county is, like that of a county officer, to be filed with the clerk of the county. State ex rel. Doran v. Hays, 27 M 174, 177, 70 P 321.

Misnomer in Party Name

An error in the certificate of nomination filed in accordance with this section consisting of a misnomer in the name of the party which the convention represented, renders such certificate insufficient and void. State ex rel. Scharnikow v. Hogan, 24 M 397, 401, 62 P 683.

References

State ex rel. Woody v. Rotwitt, 18 M 502, 506, 46 P 370; State ex rel. Scharnikow v. Hogan, 24 M 379, 380, 62 P 493; State ex rel. Holliday v. O'Leary, 43 M 157, 167, 115 P 204; State ex rel. Wheeler v. Stewart, 71 M 358, 365, 230 P 366; State ex rel. Mitchell v. District Court, 128 M 325, 275 P 2d 642, 648.

Collateral References

Elections \$39. 29 C.J.S. Elections \$137. 25 Am. Jur. 2d 831, Elections, \$140.

23-804. (615) Certificates of nomination otherwise made. Candidates for public office may be nominated otherwise than by convention or primary meeting in the manner following:

A certificate of nomination, containing the name of a candidate for the office to be filled, with such information as is required to be given in certificates provided for in section 23-802, must be signed by electors residing within the state and district, or political division in and for which the officer or officers are to be elected, in the following required numbers:

The number of signatures must not be less in number than five per cent of the number of votes cast for the successful candidate for the same office at the next preceding election, whether the said candidate be state, county, township, municipal, or any other political division or subdivision of state or county; but the signatures need not all be appended to one paper. Each elector signing a certificate shall add to his signature his place of residence, his business, and his business address. Any such cer-

tificate may be filed as provided for in the next preceding section of this chapter, in the manner and with the same effect as a certificate of nomination made by a party convention or primary meeting.

History: En. Sec. 5, p. 136, L. 1889; re-en. Sec. 1313, Pol. C. 1895; re-en. Sec. 524, Rev. C. 1907; re-en. Sec. 615, R. C. M. 1921. Cal. Pol. C. Sec. 1188.

Application of Section

This section, providing that candidates for public office may be nominated otherwise than by convention or primary meeting, to wit, by petition, is applicable to the nomination of independent candidates. State ex rel. Wheeler v. Stewart, 71 M 358, 360, 230 P 366.

Nomination by Certificate

Court refrained from deciding the question whether, under this section, a certificate of nomination, to be valid, must contain the designation of a party or principle, but was disposed to regard it as contemplating simply the candidacy of one not a nominee of a party—an independent or elector's candidate. When all the statutes were read with relation to the different conditions contemplated, the court was not prepared to say that the information referred to in this section necessarily extended to more than the name, residence, business address, and the name, residence, business address, and the name, residence for which the candidate was nominated. It was decided that a candidate for district judge could not, by petitions, have his name placed on the ticket of a regular party in existence. State ex rel. Woody v. Rotwitt, 18 M 502, 509, 46 P 370.

Nominee To Fill Vacancy

The primary election law applies to all situations where it can be made reasonably operative. Where a county treasurer, elected in November, 1942 for a four-year term ending March 1, 1947, died after he had qualified and before commencement of the term for which he was elected, the

appointee of the county commissioners under section 5, article XVI of the constitution would hold until next general election on November 7, 1944, and procedure under Primary Law (23-901 et seq. and section 5, article XVI of the constitution) is controlling. A vacancy occurring after the primary and prior to the general election or at any other inapplicable time authorizes nomination under this section or section 23-801, section 23-909 then not applying. LaBorde v. McGrath, 116 M 283, 286, 149 P 2d 913, distinguished in 117 M 160, 170, 157 P 2d 108 and 130 M 202, 208, 299 P 2d 446.

Nominees to be placed on ballot at special election to fill vacancy resulting from death of representative in Congress must be chosen pursuant to this section or section 23-801 and not by special nominating election. Bottomly v. Ford, 117 M 160, 167, 157 P 2d 108.

Presidential Electors

A candidate for presidential elector, is a candidate for public office within the meaning of this section and may therefore be nominated independently. State ex rel. Wheeler v. Stewart, 71 M 358, 360, 230 P 366.

References

State ex rel. Haviland v. Beadle, 42 M 174, 176, 111 P 720; State ex rel. Holliday v. O'Leary, 43 M 157, 165, 115 P 204; State ex rel. Rowe v. Kehoe, 49 M 582, 584, 144 P 162; State ex rel. Reibold v. Duncan, 55 M 380, 383, 177 P 250; State ex rel. Foster v. Mountjoy, 83 M 162, 168, 271 P 446.

Collateral References

Elections 143, 144. 29 C.J.S. Elections §§ 108-110, 135.

23-805. (616) Certificate not to contain certain things—one person not to be nominated for more than one office. No certificate of nomination must contain the name of more than one candidate for each office to be filled. No person must join in nominating more than one person for each office to be filled, and no person must accept a nomination to more than one office.

History: En. Sec. 6, p. 136, L. 1889; re-en. Sec. 1314, Pol. C. 1895; re-en. Sec. 525, Rev. C. 1907; re-en. Sec. 616, R. C. M. 1921. Cal. Pol. C. Sec. 1190.

Nomination of Two Tickets

Where the same committee appointed by a mass convention nominated two

tickets, composed of different persons as candidates for the same offices, such a proceeding was not only wrong, but illegal, and was within the inhibition of this section. This could not have been done by the convention, nor could it be done by the committee, and the names of such nominees were not entitled to places on

the official ballot. State ex rel. Athey v. Hays, 31 M 233, 237, 78 P 486.

Collateral References
Elections 144.
29 C.J.S. Elections 88 108, 135.

23-806. (617) Certificates to be preserved one year. The secretary of state and the clerks of the several counties and of the several municipal corporations must cause to be preserved in their respective offices for one year all certificates of nomination filed under the provisions of this chapter. All such certificates must be open to public inspection under proper regulations to be made by the officers with whom the same are filed.

History: En. Sec. 7, p. 137, L. 1889; re-en. Sec. 1315, Pol. C. 1895; re-en. Sec. 526, Rev. C. 1907; re-en. Sec. 617, R. C. M. 1921. Cal. Pol. C. Sec. 1191.

References

State ex rel. Mitchell v. District Court, 128 M 325, 275 P 2d 642, 648.

Collateral References

Elections 145. 29 C.J.S. Elections 137. 25 Am. Jur. 2d 831, Elections, 140.

23-807. (618) When certificates to be filed. Certificates of nomination to be filed with the secretary of state must be filed with the secretary of state not less than sixty (60) days before the date fixed by law for the election. Certificates of nomination herein directed to be filed with the county clerk must be filed not less than sixty (60) days before the election. Certificates of nomination of candidates for municipal offices must be filed with the clerks of the respective municipal corporations not more than thirty (30) days and not less than fifteen (15) days previous to the day of election; but the provisions of this section shall not be held to apply to nominations for special elections or to fill vacancies.

History: En. Sec. 8, p. 137, L. 1889; amd. Sec. 1316, Pol. C. 1895; re-en. Sec. 527, Rev. C. 1907; re-en. Sec. 618, R. C. M. 1921; amd. Sec. 1, Ch. 64, L. 1925; amd. Sec. 1, Ch. 105, L. 1943; amd. Sec. 1, Ch. 259, L. 1947; amd. Sec. 1, Ch. 160, L. 1949; amd. Sec. 5, Ch. 156, L. 1965. Cal. Pol. C. Sec. 1192.

References

State ex rel. Mitchell v. District Court, 128 M 325, 275 P 2d 642, 646.

Collateral References

Elections 145. 29 C.J.S. Elections § 137.

DECISIONS UNDER FORMER LAW

Time of Filing

Section 1316, Pol. C. 1895, requiring certificates of nomination to be filed with the secretary of state not more than sixty nor less than thirty days before election,

was mandatory, and a certificate of original nominations made at a party convention could not be filed less than thirty days before election. State ex rel. Galen v. Hays, 31 M 227, 230, 78 P 301.

23-808. (618.1) Nominees to pay prescribed filing fee. All candidates nominated under the provisions of this chapter, shall, upon filing the certificate of nomination as provided by sections 23-803 and 23-807, pay to the officer with whom the certificates of nomination are required to be filed, the fees provided by section 23-910, and such filing fee shall be paid by every person whose name appears upon the ballot at any general election, regardless of the method pursued to secure nomination, provided, however, that only one filing fee shall be required from any candidate, regardless of the method used in having his name placed upon such general election ballot.

History: En. Sec. 1, Ch. 28, L. 1933.

Collateral References Elections \$\infty\$ 139, 145.

29 C.J.S. Elections § 137. 25 Am. Jur. 2d 879, Elections, § 132. Validity and effect of statutes exacting filing fees from candidates for public office, 89 ALR 2d 864.

23-809. (619) Secretary of state to certify to county clerk names of persons nominated. Not less than forty-five (45) days before an election to fill any public office, the secretary of state must certify to the county clerk of each county within which any of the electors may by law vote for candidates for such office, the name and description of each person nominated, as specified in the certificates of nomination filed with the secretary of state.

History: En. Sec. 9, p. 137, L. 1889; re-en. Sec. 1317, Pol. C. 1895; re-en. Sec. 528, Rev. C. 1907; re-en. Sec. 619, R. C. M. 1921; amd. Sec. 1, Ch. 58, L. 1925; amd. Sec. 1, Ch. 104, L. 1943; amd. Sec. 6, Ch. 156, L. 1965, Cal. Pol. C, Sec. 1193.

References

State ex rel. Scharnikow v. Hogan, 24

M 379, 380, 62 P 493; State ex rel. Wheeler v. Stewart, 71 M 358, 363, 230 P 366; State ex rel. Bevan v. Mountjoy, 82 M 594, 597, 268 P 558.

Collateral References

Elections \$\infty 156. 29 C.J.S. Elections \\$ 135.

DECISIONS UNDER FORMER LAW

Party Candidate

It is by means of the certificate mentioned in section 1317, Pol. C. 1895 that the county clerk is informed how to prepare the official ballot for the electors. The secretary of state cannot certify a candidate nominated by electors, as the candidate of a political party, for clearly he is not such a candidate and has no place in a group of candidates certified as nominated by a regular political party convention or organization, under the name of the party making such nomination. State ex rel. Woody v. Rotwitt, 18 M 502, 510, 511, 46 P 370.

Vacancies in Board of Railroad Commissioners

The provisions of this section, as amended in 1943, a general statute, are

in conflict with the special provisions of section 72-101, a special statute, which applies specifically and exclusively to the filling of vacancies occurring in the board of railroad commissioners of the state of Montana. State ex rel. Mitchell v. District Court, 128 M 325, 275 P 2d 642, 646.

The time limitations prescribed in this section, as amended in 1943, has no application to an election to fill a vacancy in the board of railroad commissioners created by the resignation of a regularly elected railroad commissioner where such commissioner defers and withholds the effective date of his resignation until but 32 days remain between such effective date and the day of the general election. State ex rel. Mitchell v. District Court, 128 M 325, 275 P 2d 642, 647.

23-810. (620) Declination of nomination—municipal elections. Whenever any person nominated for public office, as in this chapter provided, shall at least twenty days before election, except in the case of municipal election, in writing, signed by him, notify the office with whom the certificate nominating him is by this chapter to be filed, that he declines such nomination, such nomination shall be void. In municipal elections, such declination shall be made at least five days before the election.

History: En. Sec. 11, p. 138, L. 1889; re-en. Sec. 1319, Pol. C. 1895; re-en. Sec. 529, Rev. C. 1907; re-en. Sec. 620, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1925. Cal. Pol. C. Sec. 1192.

Defective Proceedings

An election will not be declared void by reason of nonprejudical defects in the manner in which nomination was declined where question was raised after election. Stackpole v. Hallahan, 16 M 40, 51, 40 P 80.

References

State ex rel. Kennedy v. Martin, 24 M 403, 408, 62 P 588.

Collateral References

Elections 146.
29 C.J.S. Elections § 95.

23-811. (621) Vacancies may be filled by further certificates. When a vacancy occurs in the office of a candidate for either house of the legislative assembly after the primary election and before the printing of the tickets for the general election, or if a candidate declines the nomination as in this chapter provided, or if any certificate of nomination is or becomes insufficient or inoperative from any cause, the vacancy or vacancies thus occasioned may be filled in the manner required for original nomination. If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, proceed to fill the same. If the vacancy occurs in a multicounty senatorial or representative district it shall be filled by a committee consisting of three (3) members from each county in the senatorial or representative district. The three (3) members shall be selected by the central committee, in each county, of the political party of the person for whom the new nominee is to be substituted. The chairman and secretary of such committee must thereupon make and file with the proper officer a certificate setting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination. The certificate so made must be executed in the manner prescribed for the original certificate of nomination, and has the same force and effect as an original certificate of nomination. When such certificate is filed with the secretary of state he must, in certifying the nominations to the various county clerks, insert the name of the person who has thus been nominated to fill a vacancy in place of the name of the original nominee. And in the event he has already transmitted his certificate he must forthwith certify to the clerks of the proper counties the name and description of the person so nominated to fill a vacancy, the office he is nominated for, the party or political principle he represents and the name of the person for whom such nominee is substituted.

History: En. Sec. 12, p. 138, L. 1889; re-en. Sec. 1320, Pol. C. 1895; re-en. Sec. 530, Rev. C. 1907; re-en. Sec. 621, R. C. M. 1921; amd. Sec. 1, Ch. 86, L. 1967. Cal. Pol. C. Sec. 1192.

Errors In Certificates

Where a convention of a political party has made a nomination, and authorized its committee to fill vacancies, and there is an error in the certificate of nomination filed, consisting of a misnomer of the party which the convention represented, such error renders the certificate void, thereby creating a vacancy to be filled by the committee as provided in this section, construed as section 1320 of the Political Code of 1895. State ex rel. Scharnikow v. Hogan, 24 M 397, 399, 62 P 683.

v. Hogan, 24 M 397, 399, 62 P 683.

The inadvertent failure to include the name of a convention nominee for a certain office in the certificate of nominations renders the certificate insufficient, within the meaning of this section, and entitles

the proper committee to fill the vacancy. State ex rel. Galen v. Hays, 31 M 227, 231, 78 P 301.

Nominations by Committees

This section does not forbid a political convention from appointing and delegating to a committee power to make nominations for office, and a nomination made by such committee after the adjournment of the convention is in effect the act of the convention, and therefore valid. State ex rel. Pigott v. Benton, 13 M 306, 325, 34 P 301.

Nominations by Committees—Filing of Certificates

This section is silent touching the time within which must be filed the certificate of nomination made by a committee to fill a vacancy occasioned by the insufficiency of the certificate of the original nomination. When a convention has made a nomination, and has authorized its com-

mittee to fill any vacancy that may occur, the filling of the vacancy by the committee upon the death or resignation of the candidate, or because the original certificate of nomination was or became insufficient or inoperative, may be made at any time before the day of election. State ex rel. Scharnikow v. Hogan, 24 M 397, 402, 62 P 683; State ex rel. Galen v. Hays, 31 M 227, 231, 78 P 301.

References

State ex rel. Kennedy v. Martin, 24 M 403, 408, 62 P 588.

Collateral References

Elections 147.
29 C.J.S. Elections §§ 93, 94, 136, 166.

23-812. (622) Errors, how corrected. Whenever it appears by affidavit that an error or omission has occurred in the publication of the name or description of a candidate nominated for office, or in the printing of the ballots, the district court of the county may, upon application of any elector, by order require the county or municipal clerk to correct such error, or to show cause why such error should not be corrected.

History: En. Sec. 19, p. 140, L. 1889; re-en. Sec. 1322, Pol. C. 1895; re-en. Sec. 532, Rev. C. 1907; re-en. Sec. 622, R. C. M. 1921.

Construction of Section

This section contemplates and authorizes the institution of proceedings to cure, not alone clerical omissions or errors, but likewise extends to instances of defects by way of omissions of names of candidates from the ballot, as well as to erroneous insertions of names of persons as candidates who are not in fact entitled

to be so regarded, and whose names, unless stricken off the official ballot, will be erroneously printed thereon. State ex rel. Brooks v. Fransham, 19 M 273, 288, 48 P 1.

References

State ex rel. Scharnikow v. Hogan, 24 M 383, 392, 62 P 583.

Collateral References

Elections \$\infty 158.
29 C.J.S. Elections \\$\\$ 90, 138.

23-813. (623) Qualification of voter at primary election. No person shall be entitled to vote at any caucus, primary meeting, or election, held by any political party, except he be an elector of the state and county within which such caucus, primary meeting, or election is held, and a legal resident of the precinct or district within which such caucus, primary meeting, or election is held, and the limits of which said precinct or district are fixed and prescribed by the regularly chosen and recognized representatives of the party issuing the call for such caucus, primary meeting, or election.

History: En. Sec. 1330, Pol. C. 1895; re-en. Sec. 533, Rev. C. 1907; re-en. Sec. 623, R. C. M. 1921.

Collateral References

Elections 225, 126 (4). 29 C.J.S. Elections § 91, 104, 115. 25 Am. Jur. 2d 853, Elections, § 158.

23-814. (624) Who entitled to vote. No person shall be entitled to vote at any caucus, primary meeting, or election, who is not identified with the political party holding such caucus, primary meeting, or election, or who does not intend to act with such political party at the ensuing election, whose candidates are to be nominated at such caucus or primary meeting. And no person, having voted at any primary meeting or election of any political party whose candidates are to be or have been nominated, shall be permitted to vote at the primary meeting or election of any other political party whose candidates are to be or have been nominated and to be voted for at the same general or special election.

History: Ap. p. Sec. 1331, Pol. C. 1895; amd. Sec. 1, p. 115, L. 1901; re-en. Sec. 534, Rev. C. 1907; re-en. Sec. 624, R. C. M. 1921.

Collateral References Elections ⇔ 125, 126 (4). 29 C.J.S. Elections §§ 91, 104, 115 et seq. 25 Am. Jur. 2d 854, Elections, § 159.

23-815. (625) Judges. Three judges, who shall be legal voters in the precinct where such caucus or primary meeting is held, shall be chosen by the qualified voters of said precinct or district, who are present at the opening of such caucus or primary meeting, and said judges shall be empowered to administer oaths and affirmations, and they shall decide all questions relating to the qualifications of those voting or offering to vote at such caucus or primary meeting, and they shall correctly count all votes cast and certify the results of the same.

History: En. Sec. 1332, Pol. C. 1895; re-en. Sec. 535, Rev. C. 1907; re-en. Sec. 625, R. C. M. 1921.

23-816. (626) Clerk. The judges shall select one of their number who shall act as clerk, and the clerk must keep a true record of each and every person voting, with their residence, giving the street and number and post-office address.

History: En. Sec. 1333, Pol. C. 1895; re-en. Sec. 536, Rev. C. 1907; re-en. Sec. 626, R. C. M. 1921. Cal. Pol. C. Sec. 1229. Collateral References
Elections © 125.
29 C.J.S. Elections § 91.
25 Am. Jur. 2d 730, Elections, § 44.

23-817. (627) Challenges—oath—penalty. Any qualified voter may challenge the right of any person offering to vote at such caucus or primary meeting, and in the event of such challenge, the person challenged shall swear to and subscribe an oath administered by one of the judges, which oath shall be substantially as follows:

"I do solemnly swear that I am a citizen of the United States, and am an elector of this county and of this precinct where this primary is now being held, that I have been and now am identified with the party or that it is my intention bona fide to act with the party, and identify myself with the same at the ensuing election, and that I have not voted at any primary meeting or election of any other political party whose candidates are to be voted for at the next general or special election."

If the challenged party takes the oath above prescribed he is entitled to vote; provided, in case a person taking the oath as aforesaid shall intentionally make false answers to any questions put to him by any one of the judges concerning his right to vote at such caucus or primary meeting or election, he shall, upon conviction he deemed guilty of perjury, and shall be punished by imprisonment in the penitentiary for term of not less than one year nor more than three years.

History: Ap. p. Sec. 1334, Pol. C. 1895; amd. Sec. 2, p. 115, L. 1901; re-en. Sec. 537, Rev. C. 1907; re-en. Sec. 627, R. C. M. 1921. Cal. Pol. C. Sec. 1230.

Collateral References

Elections 2125; Perjury 55.
29 C.J.S. Elections § 91; 70 C.J.S. Perjury § 21.
26 Am. Jur. 2d 67, Elections, § 237.

23-818. (628) Fraudulent voting or counting. It shall be unlawful for any judge of any caucus for primary meeting or primary election to know-

ingly receive the vote of any person whom he knows is not entitled to vote, or to fraudulently or wrongfully deposit any ballot or ballots in the ballot box, or take any ballot or ballots from the ballot box of said caucus or primary election, or fraudulently or wrongfully mix any ballots with those cast at such caucus or primary election, or knowingly make any false count, canvass, statement, or return of the ballots cast or vote taken at such caucus or primary election.

History: En. Sec. 1335, Pol. C. 1895; re-en. Sec. 538, Rev. C. 1907; re-en. Sec. 628, R. C. M. 1921.

Collateral References Elections 313. 29 C.J.S. Elections § 327.

23-819. (629) Unlawful interference. No person shall, by bribery or other improper means or device, directly or indirectly, attempt to influence any elector in the casting of any ballot at such caucus or primary meeting, or deter him in the deposit of his ballot, or interfere or hinder any voter at such caucus or primary meeting in the full and free exercise of his right of sufferage at such caucus or primary meeting.

History: En. Sec. 1336, Pol. C. 1895; re-en. Sec. 539, Rev. C. 1907; re-en. Sec. 629, R. C. M. 1921.

Collateral References Elections 319. 29 C.J.S. Elections § 330.

Cross-Reference

Bribery of electors at conventions, penalty, sec. 94-1418.

23-820. (630) Penalties. Any person or persons violating any of the provisions of this act, except as provided in section 23-817, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars, nor more than two hundred and fifty dollars, or by imprisonment in the county jail not less than three months nor more than twelve months, or by both such fine and imprisonment, in the discretion of the court.

History: En. Sec. 3, p. 116, L. 1901; re-en. Sec. 540, Rev. C. 1907; re-en. Sec. 630, R. C. M. 1921.

Collateral References Elections 323. 29 C.J.S. Elections § 355 (1).

CHAPTER 9

PARTY NOMINATIONS BY DIRECT VOTE—THE DIRECT PRIMARY

Section 23-901. Construction of law.
23-902. Date of holding primary election—purpose.
23-903. Primary nominating election notices.
23-904. Application of law to cities and towns.

23-905. Emergency clause.

23-906. Counting of ballots.
23-907. Form of tally sheets—canvass of votes.
23-908. Pollbooks, precinct register, and tally sheets to be sealed and returned.
23-909. Political party nominations made exclusively as herein provided.
23-910. Petitions for nomination to be filed.

23-911. Form of petition for nomination.
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23-926. Notice of contest.

23-927. Service of notice—contest—how heard.

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Penalty for violation of law. 23-931.

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23-933. Penalty for bribery, etc. 23-934. General penal laws appli

General penal laws applicable.

23-935. Forgery and suppression of nomination papers.

23-936. General laws applicable to this enactment.

23-901. (631) Construction of law. Whenever the provisions of this law in operation prove to be of doubtful or uncertain meaning, or not sufficiently explicit in directions and details, the general laws of Montana, and especially the election and registration laws, and the customs, practice, usage, and forms thereunder, in the same circumstances or under like conditions, shall be followed in the construction and operation of this law, to the end that the protection of the spirit and intention of said laws shall be extended so far as possible to all primary elections, and especially to all primary nominating elections provided for by this law. If this proposed law shall be approved and enacted by the people of Montana, the title of this bill shall stand as the title of the law.

History: En. Sec. 1, Initiative Measure Nov. 1912; re-en. Sec. 631, R. C. M. 1921. Cal. Pol. C. Secs. 1357-1380.

Construction of Statutes

The so-called antifusion statute (23-1105, 23-1113 to 23-1116) was not impliedly repealed by the Primary Election Law (23-901 et seq.). State ex rel. Metcalf v. Wileman, 49 M 436, 437, 143 P 565.

Under the rule that where two statutes are enacted at the same time on the same subject, they must be construed together. and effect given to both if possible, held that the provisions of the Primary Law (23-901 et seq.) and the Corrupt Prac-tices Act (94-1427 et seq.), in so far as they refer to election contests, provide a complete and workable system, omitting section 30 of the Primary Laws (omitted from code). Wilkinson v. La Combe, 59 M 518, 520, 197 P 836.

Nominees to be placed on ballot at special election to fill vacancy resulting from death of representative in Congress must be chosen pursuant to section 23-801 or section 23-804 and not by special primary nominating election. Bottomly v. Ford, 117 M 160, 162, 157 P 2d 108.

References

Cadle v. Town of Baker, 51 M 176, 181, 149 P 960; Thompson v. Chapin, 64 M 376, 383, 209 P 1060; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465; LaBorde v. McGrath, 116 M 283, 288, 149 P 2d 913.

Collateral References

Elections 126 (1). 29 C.J.S. Elections §§ 91, 111.

23-902. (632) Date of holding primary election—purpose. On the first Tuesday of June, preceding any general election not including special elections to fill vacancies, municipal elections in towns and cities, irrigation district and school elections, at which public officers in this state and in any district or county are to be elected, a primary nominating election shall be held in accordance with this act in the several election precincts comprised within the territory for which such officers are to be elected at the ensuing election, which shall be known as the primary nominating election, for the purpose of choosing candidates by the political parties, subject to the provisions of this act, for United States senators and representatives, in Congress and all other elective state, district and county officers, and delegates to any constitutional convention or conventions that may hereafter be called, who are to be chosen, at the ensuing election wholly by electors within the state, or any subdivision of this state, and also for choosing and electing county central committeemen and committeewomen by the several parties subject to the provisions of this act.

History: En. Sec. 2, Initiative Measure Nov. 1912; re-en. Sec. 632, R. C. M. 1921; amd. Sec. 1, Ch. 118, L. 1925; amd. Sec. 1, Ch. 3, L. 1927; amd. Sec. 12, Ch. 214, L. 1953 (Referendum Measure adopted November 2, 1954 effective December 7, 1954); amd. Sec. 1, Ch. 266, L. 1955; amd. Sec. 1, Ch. 274, L. 1959; amd. Sec. 2, Ch. 156, L. 1965; amd. Sec. 1, Ch. 151, L. 1967.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 463, 210 P 465; State ex rel. Foster v. Mountjoy, 83 M 162, 166, 271 P 446; State ex rel. Wulf v. McGrath, 111 M 96, 99, 106 P 2d 183; LaBorde v. McGrath, 116 M 283, 288, 149 P 2d 913; Bottomly v. Ford, 117 M 160, 164, 157 P 2d 108.

Collateral References

Elections \$\insim 126 (1). 29 C.J.S. Elections \\$\\$ 91, 111. 25 Am. Jur. 2d 839, Elections, \\$ 147.

Determination of controversies within political party. 20 ALR 1035 and 169 ALR 1281.

Validity of public election as affected by fact that it was held at time other than that fixed by law. 121 ALR 987.

Constitutionality, construction, and application of statutes regarding party affiliations or change thereof as affecting eligibility to nomination for public office. 153 ALR 641.

Power of political party or its officials to withdraw nominations. 155 ALR 186.

23-903. (633) Primary nominating election notices. It shall be the duty of the county clerk, twenty (20) days before any primary nominating election, to prepare printed notices of such election, and mail two of said notices to each judge and clerk of election in each precinct: and it shall be the duty of the several judges and clerks immediately to post said notices in public places in their respective precincts. Said notices shall be substantially in the following form:

PRIMARY NOMINATING ELECTION NOTICE

Notice is hereby given that on	, the
day of, 19, at the	, in the precinct of
, Montana, a primary no	ominating election will be
held at which the (insert the names of political pa	rties subject to this law)
will choose their candidates for state, district, co	ounty, precinct and other
offices, namely (here name the offices to be filled	d, including a senator in
Congress, delegates to any constitutional convention	on then called, and candi-
dates for county central committeemen to be elec	eted); which election will
be held at ten o'clock a.m., and will continue un	
said day; provided that in precincts having less	than one hundred (100)
registered electors the polls must be opened at one	e o'clock in the afternoon
of election day and must be kept open continu-	ously until eight o'clock
p. m. of said day, when they must be closed; prov	vided further, that when-
ever all registered electors in any precinct have	voted the polls shall be
immediately closed.	

Dated this day of, 19...., county clerk.

History: En. Sec. 3, Initiative Measure Nov. 1912; re-en. Sec. 633, R. C. M. 1921; amd. Sec. 3, Ch. 167, L. 1945; amd. Sec. 2, Ch. 207, L. 1955.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart,

64 M 453, 463, 210 P 465; State ex rel. Wulf v. McGrath, 111 M 96, 100, 106 P 2d 183.

Collateral References

Elections \$ 126 (2). 29 C.J.S. Elections § 117.

23-904. (634) Application of law to cities and towns. The nomination of candidates for municipal offices by the political parties, subject to the provisions of this law, shall be governed by this law in all incorporated towns and cities of this state having a population of thirty-five hundred and upward as shown by the last preceding national or state census. All petitions by the members of such political parties for placing the names of candidates for nomination for such municipal offices on the primary nominating ballots of the several political parties shall be filed with the city clerk of said several towns and cities, and it shall be the duty of such officers to prepare and issue notices of election for such primary nominating elections in like manner as the several county clerks perform similar duties for nomination by such political parties for county offices at primary nominating elections. The duties imposed by this law on the county clerks at primary nominating elections are hereby, as to said towns and cities, designated to be the duties of the city clerk of said towns and cities as to primary nominating elections of the political parties, subject to the provisions of this law, provided, that in cities and towns the primary nominating election shall be held on the fourteenth day preceding their municipal elections. If no petitions for nomination under this law for any office to be filled at the next ensuing annual city election is filed with the city clerk of any city, not less than 30 days before the date fixed by law for the holding of a primary nominating election, then there shall be no primary election held within such city, and the city clerk shall, not less than twenty-five days before the date fixed for the holding of the primary nominating election, certify to the county clerk of the county in which such city or town is situated that no petition for nomination under the direct primary election law for any office to be filled at the next ensuing annual election has been filed with such city clerk within the time provided by law. Under the provisions of this law the lawfully constituted legislative and executive authorities of cities and town, within the provisions of this section, shall have such power and authority over the establishing of municipal voting precincts and wards, municipal boards of judges and clerks of election and other officers of their said municipal election, and other matters pertaining to municipal primary nominating elections required for such cities and towns by this law, such legislative and executive authorities have over the same matter at their municipal elections for choosing the public officers of said cities and towns.

History: En. Sec. 4, Initiative Measure Nov. 1912; amd. Sec. 1, Ch. 88, L. 1921; re-en. Sec. 634, R. C. M. 1921; amd. Sec. 1, Ch. 62, L. 1933.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

23-905. (635) Emergency clause. This act is declared to be an emergency law, and a law necessary for the immediate preservation of the public peace and safety.

History: En. Sec. 3, Ch. 88, L. 1921; re-en. Sec. 635, R. C. M. 1921.

Collateral References
Elections 26 (1).
29 C.J.S. Elections § 91.

(636) Counting of ballots. Immediately after the closing of the polls at a primary nominating election, the clerks and judges of election shall open the ballot boxes at each polling place and proceed to take therefrom the ballots. Said officers shall count the number of ballots cast by each political party, at the same time bunching the tickets cast for each political party together in separate piles, and shall then fasten each pile separately by means of a brass clip, or may use any means which shall effectually fasten each pile together at the top of each ticket. As soon as the clerks and judges have sorted and fastened together the ballots separately for each political party, then they shall take the tally sheets provided by the county clerk and shall count all the ballots for each political party separately until the count is completed, and shall certify to the number of votes for each candidate for nomination for each office upon the ticket of each party. They shall then place the counted ballots in the box. After all have been counted and certified to by the clerks and judges they shall seal the returns for each of said political parties in separate envelopes, to be returned to the county clerk.

History: En. Sec. 5, Initiative Measure Nov. 1912; re-en. Sec. 636, R. C. M. 1921.

Wulf v. McGrath, 111 M 96, 100, 106 P 2d 183.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465; State ex rel.

Collateral References

Elections № 126 (7). 29 C.J.S. Elections § 119. 26 Am. Jur. 2d 122, Elections, § 298.

- 23-907. (637) Form of tally sheets—canvass of votes. Tally sheets for each political party having candidates to be voted for at said primary nominating election shall be furnished for each voting precinct by the county clerk, at the same time and in the same manner that the ballots are furnished and shall be substantially as follows:

The names of the candidates shall be placed on the tally sheets and numbered in the order in which they appear on the official and sample ballots, and in each case shall have the proper political party designated at the head thereof.

(2) The following shall be the form of the tally sheets kept by the judges, and clerks of the primary nominating election under this law, containing the number and name of each person voted for, the particular office for nomination to which each person was voted for, the total number of votes east for each candidate for nomination. The tally or count as it is kept by each of the clerks shall be audibly announced as it proceeds, and shall be kept in the manner and form as follows:

No.	Name of Candi- date	Office	Total Vote Received	No.	Tally 5	No.	Tally 10	No.	Tally 15
12				12		12		12	
13			***************************************	13		13	********	13	*********
14		· ••••••••		14		14		14	

The columns for the numbers 12, 13, 14, etc., shall not be over three-eighths of an inch wide. The columns for the tallies shall be three-eighths of an inch wide, the lines shall be three-eighths of an inch apart; every ten lines the captions of the columns shall be reprinted between double-ruled lines in bold-faced small pica, and all figures shall be printed in bold-faced small pica. The tally sheets shall conclude with the following form of certificate:

We hereby certify that at the above primary nominating election and polling place each of the foregoing named persons received the number of votes set opposite his name, as above set forth, for the nomination for the office specified.

, Chairman.	, Clerk.
ŕ	(Who kept this sheet.)
, Judge.	, Clerk.
Judge.	, Clerk.
	(Who kept the other sheet.)

(3) During the counting of the ballots each clerk shall, with pen and ink, keep tally upon one of the above tally sheets, of each political party, and shall total the number of tallies and write the total in ink immediately to the right of the last tallies for each candidate and also in the columns headed "total vote" and shall prepare the certificate thereto above indicated; and immediately upon the completion of the count, all the clerks shall sign the tally sheets, and each of them shall certify which sheets were kept by him; and the chairman and the judges, being satisfied of the correctness of the same, shall then sign all of said tally sheets. The clerks shall then prepare a statement of that portion of the tally sheets showing the number and the name and political party of each candidate for nomination and the office and total votes received by each in the precinct, and shall prepare the certificate thereto, which statement shall be signed by the judges and clerks who complete the count, and shall be immediately posted in a conspicuous place on the outside of said polls, there to remain for ten days.

History: En. Sec. 6, Initiative Measure Nov. 1912; re-en. Sec. 637, R. C. M. 1921.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

23-908. (638) Pollbooks, precinct register, and tally sheets to be sealed and returned. (1) Immediately after canvassing the votes in the manner

aforesaid, the judges and clerks who complete the count, before they separate or adjourn shall enclose the pollbooks in separate covers and securely seal the same. They shall also enclose the tally sheets in separate envelopes and seal the same securely. They shall also enclose the precinct registers in separate envelopes and seal the same securely. They shall also envelope all the ballots fastened together, as aforesaid, and seal the same securely; and they shall in writing, with pen and ink, specify the contents, and address each of said packages upon the outside thereof to the county clerk of the county in which the election precinct is situated. These sealed packages of counted ballots shall be marked on the outside, showing what numbers are contained therein, but once sealed they are not to be opened by anyone until so ordered by the proper court.

When the count is completed, the ballots counted and sealed, and enveloped and marked for identification as aforesaid, shall be packed in the two ballot boxes, and nothing else shall be put into the boxes. The boxes shall then be locked, and the official seal of the board shall be pasted over the keyhole and over the rim of the lid of the box, so that the box cannot be opened without breaking the seal. Thereafter neither the county clerk nor the canvassers making the abstracts of the votes shall break the said seals upon the ballot boxes, nor shall anyone break the seals on the boxes or the ballots, except upon the order of the proper court in case of contest, or upon the order of the county board when the boxes are needed for the ensuing election.

History: En. Sec. 7, Initiative Measure Nov. 1912; re-en. Sec. 638, R. C. M. 1921; amd. Sec. 6, Ch. 64, L. 1959.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

23-909. (639) Political party nominations made exclusively as herein provided. Every political party which has cast three per centum (3%) or more of the total vote cast for representative in Congress at the next preceding general election in the county, district or state for which nominations are proposed to be made, shall nominate its candidates for public office in such county, district or state, under the provisions of this law, and not in any other manner; and it shall not be allowed to nominate any candidate in the manner provided by section 23-801. Every political party and its regularly nominated candidates, members, and officers, shall have the sole and exclusive right to the use of the party name and the whole thereof, and no candidate for office shall be permitted to use any word of the name of any other political party or organization than that of and by which he is nominated. No independent or nonpartisan candidate shall be permitted to use any word of the name of any existing political party or organization in his candidacy. The names of candidates for public office nominated under the provisions of this law shall be printed on the official ballots for the ensuing election as the only candidates of the respective parties for such public office in like manner as the names of the candidates nominated by other methods are required to be printed on such official ballots.

Any political party that did not cast three per centum (3%) or more of the total vote cast for representative in Congress, as above, and any new political party about to be formed or organized, [may] make nominations for public office as provided in section 23-801.

History: En. Sec. 8, Initiative Measure Nov. 1912; re-en. Sec. 639, R. C. M. 1921; amd. Sec. 1, Ch. 7, L. 1927; amd. Sec. 2, Ch. 266, L. 1955; amd. Sec. 2, Ch. 274, L. 1959.

Compiler's Note

The bracketed word "may" was inserted by the compiler, as it was omitted in the 1955 amendment. Such bracketed word was included in the enactment of the 1959 amendment.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465; Bottomly v. Ford, 117 M 160, 165, 157 P 2d 108.

Collateral References

Elections \$\insigma 126 (1).
29 C.J.S. Elections \\$\\$ 91, 111.
25 Am. Jur. 2d 814, Elections, \\$ 128.

Constitutionality of statute relating to power of committee or officials of political party. 62 ALR 924.

Extent of power of political party, committee or officer to exclude persons from participating in its primaries as voter or candidates. 70 ALR 1501; 88 ALR 473; 97 ALR 685 and 151 ALR 1121.

Political principles or affiliations as ground for refusal of government officials to take steps necessary to representation of party or candidate upon official ticket. 130 ALR 1471.

Personal liability of public officer for breach of duty in respect of election or primary election laws. 153 ALR 109.

Validity of percentage of vote or similar requirement for participation by political parties in primary election. 70 ALR 2d 1162.

DECISIONS UNDER FORMER LAW

Construction

Where the legislature at the same session passes two statutes relating to the same subject matter, it may not be presumed that by enacting the second, without making reference to the first, it intended to limit the scope of the first, but the two must be read together and harmonized, and under that rule, held that chapter 7, Laws of 1927 (this section prior to 1955 amendment), and chapter 126 (23-1001 et seq.), providing for a method of electing presidential electors, etc., are not in irreconcilable conflict. State ex rel. Foster v. Mountjoy, 83 M 162, 168, 271 P 446.

Independent Party

Assuming (but not deciding) that an existing political party may use the term "Independent" in its party name, such use cannot deprive another candidate from employing that term in designating the character of his candidacy for the same office, and provision of this section (prior to 1927 amendment), prohibiting an independent candidate from using any word of the name of an existing political party has no application in such circumstances. State ex rel. Wheeler v. Stewart, 71 M 358, 361, 230 P 366.

Presidential Electors Are Candidates for Public Office

Candidates for presidential electors are candidates for public office, within the meaning of this section (prior to 1955 amendment), providing for primary elections of candidates for public office. State

ex rel. Foster v. Mountjoy, 83 M 162, 168, $271~\mathrm{P}$ 446.

When Party May Nominate Candidates by Convention System

Under chapter 7, Laws of 1927 (this section prior to 1955 amendment), a political party which did not cast at least three per cent of the total vote cast for representative in Congress at the next preceding general election, or a new party about to be formed, may make nominations for public office by the convention system provided for by section 23-801 et seq. State ex rel. Foster v. Mountjoy, 83 M 162, 168, 271 P 446.

On application for writ of mandate to compel the secretary of state to place the names of the candidates of the Workers (Communist) party for presidential electors, nominated by it at a mass convention, upon the official ballot for the general election to be held on November 6, 1928, refusal so to do being based on the ground that such party was in existence in 1924, and therefore could not make nominations by convention, held that even if it was in existence prior to the spring primary of 1928, it was nevertheless entitled to a place on the ballot because it failed to cast three per cent of the vote for representative in Congress on the last general election, whether that election be held to be the one of 1924 or of 1926, and therefore could select its candidates by convention. State ex rel. Foster v. Mountjoy, 83 M 162, 168, 271 P 446.

Whenever it would be impossible or unreasonable for candidates to file and otherwise comply with the Primary Nominating Election Law (23-901 et seq.) the prohibition of this section (prior to 1955 amendment) would not apply and candidates could be nominated pursuant to sections 23-801 and 23-804. LaBorde v. McGrath, 116 M 283, 288, 149 P 2d 913.

When Party Must Nominate Candidates under Primary Election Law

Whenever the provisions of the Primary Nominating Election Law (23-901 et seq.) apply, the convention or primary meeting methods of making nominations provided for in section 23-801, are expressly ruled out and prohibited by this section (prior to 1955 amendment). LaBorde v. McGrath, 116 M 283, 288, 149 P 2d 913.

23-910. (640) Petitions for nomination to be filed. (1) Any person who shall desire to become a candidate for nomination to any office under this law shall send by registered mail, or otherwise, to the secretary of state, county clerk, or city clerk, a petition for nomination, signed by himself, accompanied by the filing fee hereinafter provided for, and such petition shall be filed and shall be conclusive evidence for the purpose of this law that such elector is a candidate for nomination by his party. All nominating petitions pertaining to congressional, state or district offices to be voted for in more than one county, for members of the legislative assembly, and for judges of the district court shall be filed in the offices of the secretary of state; for county and district offices, to be voted for in one county only, and for township and precinct offices, shall be filed in the office of the county clerk; and for all city offices in the office of the city clerk.

The fees required to be paid for filing such petitions shall be as follows: For any office with a salary attached of one thousand dollars (\$1,000.00) or less per annum, ten dollars (\$10.00); except candidates for the state senate and house of representatives shall be fifteen dollars (\$15.00).

For any office with a salary attached of more than one thousand dollars (\$1,000.00) per annum, one per cent (1%) of total amount of annual salary.

For the office of county commissioner in counties of the first class, forty dollars (\$40.00); in counties of the second class, thirty-five dollars (\$35.00); in counties of the third class, thirty dollars (\$30.00); in counties of the fourth class, twenty-five dollars (\$25.00); in all other classes of counties, ten dollars (\$10.00).

For the office the compensation of which consists of fees instead of a salary, five dollars (\$5.00).

For state, county and precinct committeeman, delegates to national conventions and presidential electors no fees shall be required to be paid.

(2) Any person receiving the nomination by having his name written in on the primary ballot, and desiring to accept such nomination, shall file with the secretary of state, county clerk, or city clerk, a written declaration indicating his acceptance of said nomination within ten (10) days after the election at which he receives such nomination, and at the same time he shall pay to the officer with whom such declaration of acceptance is filed the fee above provided for filing a primary nominating petition for such office, provided that such person must receive at least five per cent (5%) of the votes cast for such office at the last preceding general election. No candidate receiving a nomination at a primary election as above provided shall have his name printed on the official ballot for the general election without complying with the provisions of this section.

History: En. Sec. 9, Initiative Measure Nov. 1912; re-en. Sec. 640, R. C. M. 1921; amd. Sec. 1, Ch. 133, L. 1923; amd. Sec. 1, Ch. 125, L. 1927; amd. Sec. 1, Ch. 27, L. 1945; amd. Sec. 4, Ch. 194, L. 1967.

Resignation of Successful Write-in Candidate Who Filed Too Late Does Not Create Vacancy

Where a successful write-in candidate at a nominating election failed to file his acceptance within ten days after election day, his subsequent resignation did not result in a vacancy which the county central committee of his party could fill under section 23-929. State ex rel. Wilkinson v. McGrath, 111 M 102, 106 P 2d 186.

Where Deceased Candidate Received Majority of Votes, Highest Write-in Candidate Held Elected

Where a candidate for re-election to a county office died 24 days before election, his death known generally to electors, but his name placed on ballot and majority voted for him supposing to retain his widow, appointed to fill the vacancy, until the next general election, a write-in candidate whom they intended to defeat, receiving the highest vote cast for any living person, held, on his application for writ of mandate to compel the county canvassing board to reconvene and cause certificate of election issued to him, that write-in candidate elected and entitled to the office. State ex rel. Wolff v. Geurkink,

111 M 417, 426, 109 P 2d 1094, 133 ALR 304.

Write-in Candidates Must File Within Ten Days after "Election" Day

Construing this section as to when a write-in candidate must file written acceptance, held, that the term "election" means the day of election and not the day on which the canvass of the ballots was completed, hence a candidate for house of representatives who filed acceptance 18 days after election was not entitled to a writ of mandate to compel the county clerk to include his name on the general election official ballot. State ex rel. Wulf v. McGrath, 111 M 96, 97, 106 P 2d 183.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465; State ex rel. McHale v. Ayers, 111 M 1, 4, 105 P 2d 686; Herweg v. Thirty Ninth Legislative Assembly of State of Montana, 246 F Supp 454.

Collateral References

Elections 226 (4).
29 C.J.S. Elections §§ 114, 115.
25 Am. Jur. 2d 862, Elections, § 168.

Right of signer of petition or remonstrance to withdraw therefrom or revoke withdrawal, and time therefor. 27 ALR 2d 604.

23-911. (641) Form of petition for nomination. The petition for nomination required by the preceding section shall be substantially in the following form:

(name and title of officer with whom
and to the members of the
s of the(state or counties of
e district or county or city, as the case may be) in
s of the(state or counties of

If I am nominated and elected I will, during my term of office (here the candidate, in not exceeding one hundred words, may state any measure or principles he especially advocates).

Signature of Candidate for Nomination.

Every such petition shall be signed as above by the elector seeking such nomination.

History: En. Sec. 10, Initiative Measure Nov. 1912; re-en. Sec. 641, R. C. M. 1921; amd. Sec. 1, Ch. 133, L. 1923; amd. Sec. 1, Ch. 6, L. 1953.

References

Wilkinson v. La Combe, 59 M 518, 520,

197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465; Mulholland v. Ayers, 109 M 558, 565, 99 P 2d 234.

Collateral References

Elections 26 (1). 29 C.J.S. Elections §§ 114, 115.

23-912. (644) Time for filing petitions for nominations. All petitions for nomination under this act for offices to be filled by the state at large or by any district consisting of more than one (1) county, and nominating petitions for judges of district courts in districts consisting of a single county, shall be filed in the office of the secretary of state not later than five (5) o'clock p. m. on any day not less than forty (40) days before the date of the primary nominating election; and for other offices to be voted for in only one (1) county, or district or city, every such petition shall be filed with the county clerk or city clerk as the case may be, not later than five (5) o'clock p. m. on any day not less than forty (40) days before the date of the primary nominating election.

History: En. Sec. 13, Initiative Measure Nov. 1912; re-en. Sec. 644, R. C. M. 1921; amd. Sec. 2, Ch. 133, L. 1923; amd. Sec. 1, Ch. 19, L. 1955; amd. Sec. 1, Ch. 38, L. 1961.

Computation of Time

Under section 90-407, the time in which an act is to be done must be computed by excluding the first day and including the last, the day on which the act is to be done. State ex rel. Burns v. Lacklen, 129 M 243, 284 P 2d 998, 1002, overruling

State ex rel. Bevan v. Mountjoy, 82 M 594, 268 P 558.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

Collateral References

Elections \$145. 29 C.J.S. Elections \$137. 25 Am. Jur. 2d 862, Elections, \$168.

23-913. (645) Register of candidates. The secretary of state, county clerk and city clerk shall keep a book entitled "Register of Candidates for Nomination at the Primary Nominating Election," and shall enter thereon on different pages of the book for different political parties subject to the provisions of this law, the title of the office sought and the name and residence of each candidate for nomination at the primary election; the name of his political party; the date of receiving the petition for nomination signed by the candidate; and such other information as may aid him in arranging his official ballot for said primary nominating election. Immediately after the canvass of votes cast at a primary nominating election is completed, the county clerk, secretary of state or city clerk, as the case may be, shall enter in his book marked "Register of Nominations," the date of such entry, the name of each candidate nominated, the office for which he is nominated, and the name of the party making the nomination.

History: En. Sec. 14, Initiative Measure Nov. 1912; re-en. Sec. 645, R. C. M. 1921; amd. Sec. 1, Ch. 133, L. 1923; amd. Sec. 2, Ch. 6, L. 1953.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

23-914. (646) Register of candidates is public record—disposition of pollbooks, tally sheets, ballots, etc. Such registers of candidates for nomination, and of nominations and petitions, letters and notices, and other writings required by law as soon as filed, shall be public records, and shall be open to public inspection under proper regulations; and when a copy of any such writing is presented at the time the original is filed, or at any time thereafter, and a request is made to have such copy compared and certified, the officers with whom such writing was filed shall forthwith compare such copy with the original on file, and, if necessary, correct the copy and certify and deliver the copy to the person who presented it on payment of his lawful fees therefor. All such writings, pollbooks, tally sheets, ballots, and ballot stubs pertaining to primary nominating elections under the provisions of this act shall be preserved as other records are for one (1) year after the election to which they pertain, at which time, unless otherwise ordered or restrained by some court, the county clerk shall destroy the ballots and ballot stubs, by fire, without anyone inspecting the same.

History: En. Sec. 15, Initiative Measure Nov. 1912; re-en. Sec. 646, R. C. M. 1921; amd. Sec. 1, Ch. 75, L. 1949.

References

Wilkinson v. La Combe, 59 M 518, 520,

197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

Collateral References

Elections \$\infty 126 (4), (5), (7).
29 C.J.S. Elections \\$\\$\ 114, 115, 118, 119.

23-915. (647) Vacancies in nominations, how filled. The provisions of sections 23-810 and 23-811 shall apply to nominations, or petitions for nominations, made under the provisions of this law, in case of the death of the candidate or his removal from the state or his county or electoral district before the date of the ensuing election, but in no other case. In case of any such vacancy by death or removal from the state, or from the county or electoral district, such vacancy may be filled by the committee which has been given power by the political party or this law to fill such vacancies substantially in the manner provided by said sections 23-810 and 23-811.

History: En. Sec. 16, Initiative Measure Nov. 1912; re-en. Sec. 647, R. C. M. 1921.

Special Election

Neither this section nor section 32 of the Primary Election Law (23-929) empowers a county central committee to make an original nomination of a candidate to an office to be filled at a special election, the officer-elect having died soon after election and before induction into office. State ex rel. Smith v. Duncan, 55 M 376, 177 P 248, distinguished in 116 M 283, 291, 149 P 2d 913.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

Collateral References

23-916. (648) Arrangement and notice of nominations. Not more than forty days and not less than twenty-five days before the day fixed by law for the primary nominating election the secretary of state shall arrange, in the manner provided by this law, for the arrangement of the names and other information upon the ballots, all the names of and information concerning all the candidates for nomination contained in the valid petitions for nomination which have been filed with him in accordance with the provisions of this law, and he shall forthwith certify the same under the seal of

the state, and file the same in his office, and make and transmit a duplicate thereof by registered letter to the county clerk of each county in the state, and he shall also post a duplicate thereof in a conspicuous place in his office and keep the same posted until after said primary nominating election has taken place. In case of emergency the secretary of state may transmit such duplicate by telegraph.

History: En. Sec. 17, Initiative Measure Nov. 1912; re-en. Sec. 648, R. C. M. 1921; amd. Sec. 1, Ch. 12, L. 1925.

197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465; State ex rel. Bevan v. Mountjoy, 82 M 594, 597, 268 P 558.

References

Wilkinson v. La Combe, 59 M 518, 520,

23-917. (649) Arrangement of ballots and notice. Not more than thirty days, and not less than twenty days before the day fixed by law for the primary nominating election, the county clerk of each county, or the city clerk of each city, as the case may be, subject to the provisions of this law, shall arrange in the manner provided by this law for the arrangement of the names and other information concerning all the candidates and parties named in the valid petitions for nomination which have been filed with him and those which have been certified to him by the secretary of state, in accordance with the provisions of this law; and he shall forthwith certify the same under the official seal of his office, and file the same in his office, and make and post a duplicate thereof in a conspicuous place in his office, and keep the same posted until after the primary nominating election has taken place; and he shall forthwith proceed and cause to be printed, according to law, the colored sample ballots and the official ballots required by this law.

History: En. Sec. 18, Initiative Measure Nov. 1912; re-en. Sec. 649, R. C. M. 1921; amd. Sec. 2, Ch. 12, L. 1925.

197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

References

Wilkinson v. La Combe, 59 M 518, 520,

Collateral References

Elections 126 (5). 29 C.J.S. Elections § 118.

23-918. (650) Supplies printed and furnished by county. All blanks, ballots, pollbooks and other supplies to be used at any primaries shall be provided, and all expenses necessarily incurred in the preparation for, or conducting such primaries shall be paid out of the treasury of the county in the same manner and by the same officers as in the case of elections.

History: En. Sec. 19, Initiative Measure Nov. 1912; re-en. Sec. 650, R. C. M. 1921; amd. Sec. 1, Ch. 34, L. 1945.

197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

References

Wilkinson v. La Combe, 59 M 518, 520,

Collateral References

Elections 26 (5), (6). 29 C.J.S. Elections § 118.

23-919. (651) Ballots, how arranged, printed and voted. (1) At all primary elections there shall be a ballot made up of the several party tickets herein provided for, each of which shall be printed on a separate sheet of white paper, and all of which shall be the same size, and shall be securely fastened together at the top and folded, provided that there shall be as many separate tickets as there are parties entitled to participate in said primary election.

23-919 ELECTIONS

- (2) The names of all candidates shall be arranged alphabetically according to surnames, under the appropriate title of the respective officers, and under the proper party designation upon the party ticket, except as hereinafter provided. When two or more persons are candidates for nomination for the same office, it shall be the duty of the county clerk in each of the counties of the state to divide the ballot forms provided by the law for the county, into sets so as to provide a substantial rotation of the names of the respective candidates as follows:
- (3) He shall divide the whole number of ballot forms for the county into sets equal in number to the greatest number of candidates for the nomination or election to any office, and he shall so arrange said sets that the names of the candidates shall, beginning with a form arranged in alphabetical order as provided herein, be rotated by removing one name from the top of the list for each nomination or office and placing said name or number at the bottom of the list for each successive set of ballot forms; provided, however, that no more than one of said sets shall be used in printing the ballots for use in any one precinct, and that all ballots furnished for use in any precinct shall be of one form and identical in every respect. If any elector write upon his ticket the name of any person who is a candidate for the same office upon some other ticket than that upon which his name is so written this ballot shall be counted for such person only as a candidate of the party upon whose ticket his name is written, and in no case shall be counted for such person as a candidate upon any other ticket. In case any person is nominated as provided in this act, upon more than one ticket. he shall within ten (10) days after such election file with the secretary of state, county clerk or city clerk, a written document indicating the party designation under which his name is to be printed on the official ballot for the general election, failing in which, his name shall be printed upon the party ticket for which his nominating petition shall have been first filed, and no candidate shall have his name printed on more than one ticket; provided, however, that in the event a candidate whose name has been printed upon the party ticket for which his nominating petition shall have been first filed shall fail of nomination upon the ticket upon which his name is so printed, his name shall not be printed upon any ballot under any party designation; and provided further that nothing in this act shall preclude any elector from having his name printed upon the ballot as an independent candidate.
- (4) The ballots with the endorsements shall be printed on white paper in substantially the forms of the Australian ballot, used in general elections, except that the candidates of each party shall be printed on a separate ticket or sheet. After preparing his ballot the elector shall detach the same from the remaining tickets and fold it so that its face will be concealed and with official stamp thereon seen. The remaining tickets attached together shall be folded in like manner by the elector who shall thereupon, without leaving the polling place, vote the marked ballot forthwith, and deposit the remaining tickets in the separate ballot box to be marked and designated as the blank ballot box. Immediately after the canvass, the judges of election shall, without examination, destroy the tickets deposited in the blank ballot box.

History: En. Sec. 20, Initiative Measure Nov. 1912; re-en. Sec. 651, R. C. M. 1921; amd. Sec. 1, Ch. 133, L. 1923; amd. Sec. 1, Ch. 14, L. 1927; amd. Sec. 1, Ch. 67, L. 1929.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465; State ex rel. McHale v. Ayers, 111 M 1, 4, 105 P 2d 686; State ex rel. Wulf v. McGrath, 111 M 96, 98, 106 P 2d 183.

Collateral References

Elections \$26 (5), (6). 29 C.J.S. Elections § 118.

Constitutionality of statute relating to election ballots as regards place or number of appearances on the ballots of names of candidates. 78 ALR 398.

Name or form of name to be used in designating candidate on election ballot. 93 ALR 911.

23-920. (652) Official and sample ballots—preparation and number. There shall be printed and furnished for each election precinct a number of ballots equal to the number of voters registered in such voting precinct and entitled to vote as such primary nominating election.

If any political party shall desire sample ballots its political committee may order the same from the county clerk or city clerk who shall collect from such committee an amount sufficient to pay the cost of printing such sample ballots, and such sample ballots after being printed, shall, on the written order of the clerk, be delivered to the committee ordering the same, but no such sample ballot shall be printed except on the order of the county or city clerk. The sample ballots shall be duplicate impressions of the official ballots to be voted, but in no case shall they be white, nor shall said sample ballots have perforated stubs, nor shall they have the same margin either at the top or sides or bottom as the official ballots have, or nearer thereto than twelve points, and the names of the candidates on the tickets composing the same shall not be rotated as required for the official ballots, but shall be impressions of the tickets belonging to lot 1 of each party.

History: En. Sec. 21, Initiative Measure Nov. 1912; re-en. Sec. 652, R. C. M. 1921; amd. Sec. 1, Ch. 133, L. 1923.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

Collateral References

Elections = 126 (5).
29 C.J.S. Elections § 118.
26 Am. Jur. 2d 82, Elections, § 254.

23-921. (654) Canvass of returns. (1) On the third day after the close of any primary nominating election, or sooner if all the returns be received, the county clerk, taking to his assistance two justices of the peace of the county of different political parties, if practicable, or two members of the board of county commissioners of the county of different political parties, if possible, or one justice of the peace and one member of the board of county commissioners of the county of different political parties, if practicable, shall proceed to open said returns and make abstracts of the votes. Such abstracts of votes for nominations for governor and for senator in Congress shall be on one separate sheet for each political party, and shall be immediately transmitted to the secretary of state in like manner as other election returns are transmitted to him. Such abstract of votes for nomination of each party for lieutenant governor, secretary of state, attorney general, state auditor, superintendent of public instruction, railroad commissioners, clerk of the supreme court, state treasurer, justices of the supreme court, members of Congress, judges of the district court, and members of the legislative assembly, shall be on one sheet, separately for each political party, and shall be forthwith transmitted to the secretary of state, as required by the following section.

(2) The abstract of votes for county and precinct offices shall be on another sheet separately for each political party; and it shall be the duty of said clerk immediately to certify the nomination for each party and enter upon his register of nominations the name of each of the persons having the highest number of votes for nomination as candidates for county, and precinct offices, respectively, and to notify by mail each person who is so nominated: provided, that when a tie shall exist between two or more persons for the same nomination by reason of said two or more persons having an equal and the highest number of votes for nomination by one party to one and the same office, the county clerk shall give notice to the several persons so having the highest and equal number of votes to attend at his office at a time to be appointed by said clerk, who shall then and there proceed publicly to decide by lot which of the persons so having an equal number of votes shall be declared nominated by his party; and said clerk shall forthwith enter upon his register of nominations the name of the persons thus duly nominated, in like manner as though he had received the highest number of the votes of his party for that nomination; and it shall be the duty of the county clerk of every county, on receipt of the returns of any general primary nominating election, to make out his certificate stating therein the compensation to which the judges and clerks of election may be entitled for their services, and lay the same before the county board of county commissioners at its next term, and the said board shall order the compensation aforesaid to be paid out of the county treasury. In all primary nominating elections in this state, under the provisions of this law, the person having the highest number of votes for nomination to any office shall be deemed to have been nominated by his political party for that office.

History: En. Sec. 23, Initiative Measure Nov. 1912; re-en. Sec. 654, R. C. M. 1921; amd. Sec. 1, Ch. 181, L. 1937; amd. Sec. 5, Ch. 194, L. 1967.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart,

64 M 453, 464, 210 P 465; State ex rel. Wulf v. McGrath, 111 M 96, 98, 106 P 2d 183.

Collateral References

Elections \$ 126 (7).
29 C.J.S. Elections § 119.
26 Am. Jur. 2d 122, Elections, § 298.

23-922. (655) Duties of county clerk after canvass of vote—state canvass. The county clerk, immediately after making the abstracts of votes given in his county shall make a copy of each of said abstracts and transmit it by mail to the secretary of state, at the seat of government; and it shall be the duty of the secretary of state, in the presence of the governor and the state treasurer, to proceed within fifteen days after the primary nominating election, and sooner, if all returns be received, to canvass the votes given for nomination for governor, senator in Congress, lieutenant governor, attorney general, superintendent of public instruction, railroad commissioners, secretary of state, state treasurer, state auditor, justices of the supreme court, clerk of the supreme court, members of Congress, judges of the district court, senators and representatives, and all other officers to be voted for by the people of the state, or of any district comprising more than one county; and the governor shall grant a certificate of nomination to

the person having the highest number of votes for each office, and shall issue a proclamation declaring the nomination of each person by his party. In case there shall be no choice for nomination for any office by reason of any two or more persons having an equal and the highest number of votes of his party for nomination for either of said offices, the secretary of state shall immediately give notice to the several persons so having the highest and equal number of votes to attend at his office, either in person or by attorney, at a time to be appointed by said secretary, who shall then and there proceed to publicly decide by lot which of said persons so having an equal number of votes shall be declared duly nominated by his party; and the governor shall issue his proclamation declaring the nomination of such person or persons, as above provided.

History: En. Sec. 24, Initiative Measure Nov. 1912; re-en. Sec. 655, R. C. M. 1921.

64 M 453, 464, 210 P 465; Herweg v. Thirty Ninth Legislative Assembly of State of Montana, 246 F Supp 454.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart,

Collateral References

Elections 26 (7), 138. 29 C.J.S. Elections §§ 119, 135.

(656) Error in ballot or count. Whenever it shall appear by affidavit to the district court or judge thereof, or to the supreme court or judge thereof, that an error or omission has occurred or is about to occur in the printing of the name of any candidate or other matter on the official primary nominating election ballots or that any error has been or is about to be committed in the printing of the ballots, or that the name of any person or any other matter has been or is about to be wrongfully placed upon such ballots, or that any wrongful act has been performed by any judge or clerk of the primary election, county clerk, canvassing board or member thereof, or by any person charged with a duty under this act, or that any neglect of duty by any of the persons aforesaid has occurred or is about to occur, such court or judge shall by order require the officer or person or persons charged with the error, wrongful act, or neglect, to forthwith correct the error, desist from the wrongful act, or perform the duty and do as the court shall order, or show cause forthwith why such error should not be corrected, wrongful act desisted from, or such duty or order performed. Failure to obey the order of any such court or judge shall be contempt. Any person in interest or aggrieved by the refusal or failure of any person to perform any duty or act required by this law shall, without derogation to any other right or remedy, be entitled to pray for a mandamus in the district court of appropriate jurisdiction, and any proceedings under the provisions of this law shall be immediately heard and decided.

History: En. Sec. 25, Initiative Measure Nov. 1912; re-en. Sec. 656, R. C. M. 1921.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 36; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

Collateral References

Contempt 20; Elections 126 (5); Mandamus 74 (1).

17 C.J.S. Contempt § 12; 29 C.J.S. Elections § 118; 55 C.J.S. Mandamus § 142. 26 Am. Jur. 2d 125, Elections, § 302.

23-924. (657) Secretary of state may send for returns. If the returns and abstracts of the primary nominating election of any county in the state

shall not be received at the office of the secretary of state within twelve days after said election, the secretary of state shall forthwith send a messenger to the county board of such county, whose duty it shall be to furnish said messenger with a copy of said returns, and the said messenger shall be paid out of the county treasury of such county the sum of twenty cents for each mile he shall necessarily travel in going to and returning from said county. The county clerk, whenever it shall be necessary for him to do so in order to send said returns and abstracts within the time above limited, may send the same by telegraph, the message to be repeated, and the county shall pay the expense of such telegram.

History: En. Sec. 26, Initiative Measure Nov. 1912; re-en. Sec. 657, R. C. M. 1921.

197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

References

Wilkinson v. La Combe, 59 M 518, 520,

Collateral References

Elections \$26 (7). 29 C.J.S. Elections \$119.

23-925. (658) Penalty for official misconduct. If any judge or clerk of a primary nominating election, or other officers or persons on whom any duty is enjoined by this law, shall be guilty of any willful neglect of such duty, or of any corrupt conduct in the discharge of the same, such judge, clerk, officer or other person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one year nor more than five years, or by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than one hundred dollars nor more than five hundred dollars.

History: En. Sec. 27, Initiative Measure Nov. 1912; re-en. Sec. 658, R. C. M. 1921.

197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

References

Wilkinson v. La Combe, 59 M 518, 520,

Collateral References

Elections©=314. 29 C.J.S. Elections § 327.

23-926. (659) Notice of contest. Any person wishing to contest the nomination of any other person to any state, county, district, township, precinct, or municipal office may give notice in writing to the person whose nomination he intends to contest that his nomination will be contested stating the cause of such contest briefly, within five days from the time said person shall claim to have been nominated.

History: En. Sec. 28, Initiative Measure Nov. 1912; re-en. Sec. 659, R. C. M. 1921.

Cross-Reference

Application of Montana Rules of Civil Procedure to contest of nomination, see M. R. Civ. P., Rule 81(a), Table A.

References

Wilkinson v. La Combe, 59 M 518, 520,

197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465; State ex rel. Stone v. District Court, 103 M 515, 518, 63 P 2d 147; State ex rel. Wulf v. McGrath, 111 M 96, 98, 106 P 2d 183.

Collateral References

Elections \$\insigma 151.
29 C.J.S. Elections \$\\$ 123, 124, 141, 142.
26 Am. Jur. 2d 153, Elections, \\$ 332.

23-927. (660) Service of notice—contest—how heard. Said notice shall be served in the same manner as a summons issued out of the district court three days before any hearing upon such contest as herein provided shall take place, and shall state the time and place that such hearing shall be had. Upon the return of said notice served to the clerk of the court he

shall thereupon enter the same upon his issue docket as an appeal case, and the same shall be heard forthwith by the district court; provided, that if the case cannot be determined by the district court in term time, within fifteen days after the termination of such primary nominating election, the judge of the district court may hear and determine the same at chambers forthwith, and shall make all necessary orders for the trial of the case and carrying his judgment into effect; provided, that the district court provision of this section shall not apply to township or precinct officers. In case of contest between any persons claiming to be nominated to any township or precinct office, said notice shall be served in the manner aforesaid, and shall be returned to the district court of the county.

History: En. Sec. 29, Initiative Measure Nov. 1912; re-en. Sec. 660, R. C. M. 1921.

NOTE.—Section 30 of this act is omitted from this code in conformity with the decision of the supreme court in Wilkinson v. La Combe, 59 M 518, 520, 197 P 836.

References

State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

Collateral References

Elections ← 151, 154 (1). 29 C.J.S. Elections §§ 123, 124, 141, 142, 148.

26 Am. Jur. 2d 154, Elections, § 333.

State court jurisdiction over contest involving primary election for member of Congress. 68 ALR 2d 1320.

23-928. (661) Contest—how tried and decided. Each party to such contest shall be entitled to subpoenas, and subpoenas duces teeum, as in ordinary cases of law; and the court shall hear and determine the same without the intervention of a jury, in such manner as shall carry into effect the expressed will of a majority of the legal voters of the political party, as indicated by their votes for such nominations, not regarding technicalities or errors in spelling the name of any candidate for such nomination; and the county clerk shall issue a certificate to the person declared to be duly nominated by said court, which shall be conclusive evidence of the right of said person to hold said nomination; provided, that the judgment or decision of the district court in term time, or a decision of the judge thereof in vacation, as the case may be, may be removed to the supreme court in such manner as may be provided for removing such causes from the district court to the supreme court.

History: En. Sec. 31, Initiative Measure Nov. 1912; re-en. Sec. 661, R. C. M.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

Collateral References

Elections \$\infty 154 (1-13).
29 C.J.S. Elections \\$\\$ 120-129, 148.

Violation of law as regards time for keeping polls open as affecting election results. 66 ALR 1159.

Costs or reimbursement for expenses incident to election contests. 106 ALR 928.

23-929. (662) County and city central committeemen, how elected. (1) There shall be elected by each political party subject to the provisions of this act, at said primary nominating election, two (2) committeemen, one (1) of which shall be a man and one (1) of which shall be a woman, for each election precinct, who shall be residents of such precincts. Any elector may be placed in nomination for committeeman and committeewoman of any precinct by a writing so stating, signed by such elector, and filed in

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the office of the county clerk within the time required in this act for the filing of petitions naming individuals as candidates for nomination at the regular biennial primary election. The names of the various candidates for precinct committeemen and committeewomen of each political party shall be printed on the ticket of the same in the same manner as other candidates and the voter shall express his choice among them in like manner as for such other candidates.

- (2) The committeemen and committeewomen thus elected shall be the representatives of their political party in and for such precinct in all ward or subdivision committees that may be formed. The committeemen and committeewomen elected in each precinct in each county shall constitute the county central committee of each of said respective political parties. Those committeemen and committeewomen who reside within the limits of any incorporated city or town shall constitute ex officio the city central committee of each of said respective political parties and shall have the same power and jurisdiction as to the business of their several parties in such city matters that the county committee have in county matters, save only the power to fill vacancies in said committee, which power is vested in the county central committee. Each committeeman and committeewoman shall hold such position for the term of two (2) years from the date of the first meeting of said committee immediately following their election.
- (3) In case of a vacancy happening, on account of death, resignation, removal from the precinct, or otherwise, the remaining members of said county committee may select a committeeman or committeewoman to fill the vacancy and he shall be a resident of the precinct in which the vacancy occurs. Said county and city central committees shall have the power to make rules and regulations for the government of their respective political parties in each county and city, not inconsistent with any of the provisions of this law, and not inconsistent with the rules and regulations of their state political parties, and to elect two (2) county members of the state central committee, one (1) of which shall be a man and one (1) of which shall be a woman, and the members of the congressional committee, and said committee shall have the same power to fill all vacancies and make rules in their jurisdiction that the county committees have to fill county vacancies and to make rules. In the event there is no county central committee in any county the state central committee of the political party having no county central committee in said county shall appoint a county central committee therein to consist of committeemen and committeewomen as herein provided and said county central committee shall have the same powers and duties as county central committee elected, as now provided by law.
- (4) Said county and city central committee shall have the power to make nomination to fill vacancies occurring among the candidates of their respective parties nominated for city or county offices by the primary nominating election where such vacancy is caused by death, resignation or removal from the electoral district, but not otherwise.
- (5) Prior to the state convention of its political party said committee shall meet, and shall organize by electing a chairman and one (1) or more vice-chairmen, provided that either the chairman or first vice-chairman

shall be a woman. They shall also elect a secretary and such other officers as they shall think proper. It shall not be necessary for such officers to be precinct committeemen or committeewomen. They may select managing or executive committees and authorize such subcommittees to exercise any and all powers conferred upon the county, city, state and congressional central committees respectively by this law. The chairman of the county central committee shall call said central committee meeting and not less than four (4) days before the date of said central committee meeting shall publish said call in a newspaper published at the county seat and shall mail a copy of the call, enclosing a blank proxy, to each precinct committeeman. No proxy shall be recognized unless held by an elector of the precinct of the committeeman executing the same.

- (6) The county chairman of the party shall preside at the county convention. No person other than a duly elected or appointed committeeman, committeewoman, or officer of the committee shall be entitled to participate in the proceedings of the committee. No proxy shall be recognized unless held by an elector of the precinct of the committeeman or committeewoman executing the same. In case of the absence of any committeeman or committeewoman and his or her duly appointed proxy, the convention may fill the vacancy by appointing some qualified elector of the party, resident in the precinct, to represent such precinct in the convention.
- (7) The county convention shall elect delegates and alternate delegates to attend the state convention under the rules and regulations of the state party. The chairman and secretary of the county convention shall issue and sign certificates of election of said delegates.

History: En. Sec. 32, Initiative Measure Nov. 1912; re-en. Sec. 662, R. C. M. 1921; amd. Sec. 1, Ch. 98, L. 1927; amd. Sec. 1, Ch. 34, L. 1929; amd. Sec. 1, Ch. 6, L. 1933; amd. Sec. 1, Ch. 84, L. 1939; amd. Sec. 1, Ch. 64, L. 1951; amd. Sec. 3, Ch. 266, L. 1955; amd. Sec. 1, Ch. 219, L. 1959; amd. Sec. 7, Ch. 156, L. 1965.

Nomination To Fill Vacancy in Office

Neither this section nor section 16 of the Primary Election Law (23-915) empowers a county central committee to make an original nomination of a candidate to an office to be filled at a special election, the officer-elect having died soon after election and before induction into office. State ex rel. Smith v. Duncan, 55 M 376, 177 P 248, distinguished in 116 M 283, 291, 149 P 2d 913.

Resignation of Successful Write-in Candidate Who Filed Too Late Does Not Create Vacancy

Where a successful write-in candidate at a nominating election failed to file his acceptance within ten days after election day, his subsequent resignation did not result in a vacancy which the county central committee of his party could fill under this section. State ex rel. Wilkinson v. McGrath, 111 M 102, 106 P 2d 186.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

Collateral References

Elections 221 (1), (2). 29 C.J.S. Elections §§ 83, 84, 86-88. 25 Am. Jur. 2d 808, Elections, § 123.

23-930. (663) Repealed—Chapter 156, Laws of 1965.

Reneal

This section (Sec. 1, Ch. 1, Ex. L. 1921; Sec. 1, Ch. 159, L. 1925), relating to se-

lection and terms of national committeemen was repealed by Sec. 11, Ch. 156, Laws 1965.

23-931. (665) Penalty for violation of law. If any candidate for nomination shall be guilty of any wrongful or unlawful act or acts at a primary nominating election which would be sufficient, if such wrongful or unlaw-

ful act or acts had been done by such candidate at the regular general election, to cause his removal from office, he shall, upon conviction thereof, be removed from office in like manner as though such wrongful or unlawful act or acts had been committed at a regular general election, notwithstanding that he may have been regularly elected and shall not have been guilty of any wrongful or unlawful act at the election at which he shall have been elected to his office.

History: En. Sec. 33, Initiative Measure Nov. 1912; re-en. Sec. 665, R. C. M. 1921.

197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

References

Wilkinson v. La Combe, 59 M 518, 520,

Collateral References

Officers \$66. 67 C.J.S. Officers § 60.

23-932. (666) Repealed—Chapter 156, Laws of 1965.

Repeal

This section (Sec. 34 Initiative Measure Nov. 1912; Sec. 666, R. C. M. 1921;

Sec. 1, Ch. 8, L. 1953), relating to the formulation of state party platforms, was repealed by Sec. 11, Ch. 156, Laws 1965.

23-933. (667) Penalty for bribery, etc. Any person who shall offer, or with knowledge of the same permit any person to offer for his benefit, any bribe to a voter to induce him to sign any nomination paper, and any person who shall accept any such bribe or promise of gain of any kind in the nature of a bribe as consideration for signing the same, whether such bribe or promise of gain in the nature of a bribe be offered or accepted before or after such signing, shall be guilty of a misdemeanor, and upon trial and conviction thereof be punished by a fine of not less than twenty-five nor more than one thousand dollars, and by imprisonment in the county jail of not less than ten days nor more than six months.

History: En. Sec. 35, Initiative Measure Nov. 1912; re-en. Sec. 667, R. C. M. 1921.

Cross-Reference

Bribery at elections, penalty, sec. 94-1423.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

Collateral References

Elections © 316. 29 C.J.S. Elections § 343. 26 Am. Jur. 2d 111, Elections, § 287. Treating of voters by candidate for office as violation of corrupt practices or similar acts. 2 ALR 402.

Constitutionality of Corrupt Practices Acts. 69 ALR 377.

Construction of statute prohibiting solicitation or acceptance of contributions or subscriptions by public officer or employee. 85 ALR 1146.

Statements by candidates regarding salaries or fees of office as violation of Corrupt Practices Acts or bribery. 100 ALR 493.

Construction and application of provi-

Construction and application of provisions of Corrupt Practices Act regarding contributions by corporations. 125 ALR 1029.

23-934. (668) General penal laws applicable. Any act declared an offense by the general laws of this state concerning caucuses, primaries and elections shall also, in like case, be an offense in and as to all primaries as herein defined, and shall be punished in the same form and manner as therein provided, and all the penalties and provisions of the law as to such caucuses, primaries and elections, except as herein otherwise provided, shall apply in such case with equal force, and to the same extent as though fully set forth in this act.

ure Nov. 1912; re-en. Sec. 668, R. C. M. 1921.

History: En. Sec. 36, Initiative Meas- 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

References

Wilkinson v. La Combe, 59 M 518, 520,

Collateral References

Elections 309 et seq. 29 C.J.S. Elections §§ 324, 334.

23-935. (669) Forgery and suppression of nomination papers. person who shall forge any name of a signer or a witness to a nomination paper shall be guilty of forgery, and on conviction punished accordingly. Any person who, being in possession of nomination papers entitled to be filed under this act, or any act of the legislature, shall wrongfully either suppress, neglect or fail to cause the same to be filed at the proper time in the proper office, shall, on conviction, be punished by imprisonment in the county jail not to exceed six months, or by a fine not to exceed one thousand dollars, or by both such fine and imprisonment in the discretion of the court.

History: En. Sec. 37. Initiative Measure Nov. 1912; re-en. Sec. 669, R. C. M.

Cross-Reference

False nomination certificate, penalty, sec.

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart, 64 M 453, 464, 210 P 465.

Collateral References

Elections 309; Forgery 7 (1). 29 C.J.S. Elections §§ 324, 334; 37 C.J.S. Forgery, §§ 18, 20.

23-936. (670) General laws applicable to this enactment. The provisions of the laws of this state now in force in relation to the holding of elections, the solicitation of voters at the polls, the challenging of voters, the manner of conducting elections, of counting the ballots and making return thereof, the appointment and compensation of officers of election, and all other kindred subjects, shall apply to all primaries, in so far as they are consistent with this act, the intent of this act being to place the primary under the regulation and protection of the laws now in force as to elections.

ure Nov. 1912; re-en. Sec. 670, R. C. M. 1921.

References

Wilkinson v. La Combe, 59 M 518, 520, 197 P 836; State ex rel. Mills v. Stewart,

History: En. Sec. 38, Initiative Meas-ce Nov. 1912; re-en. Sec. 670, R. C. M. Chapin, 64 M 376, 383, 209 P 1060.

Collateral References

Elections = 126 (1-7). 29 C.J.S. Elections §§ 111-119, 130-134.

CHAPTER 10

POLITICAL PARTIES

Section 23-1001. Political party defined. 23-1002 to 23-1007. Repealed.

23-1008. Payment of convention expenses.
23-1009. Political parties—authority and power.

23-1001. (673.1) Political party defined. The term political party as used in this act, shall include any party conducted for political purposes, which now has or hereafter shall perfect a national organization.

History: En. Sec. 1, Ch. 126, L. 1927.

29 C.J.S. Elections & 84. 25 Am. Jur. 2d 800, Elections, § 116.

Collateral References

Elections 2121 (1).

DECISIONS UNDER FORMER LAW

Construction

Where the legislature at the same session passes two statutes relating to the same subject matter, it may not be presumed that by enacting the second, without making reference to the first, it intended to limit the scope of the first, but the two must be read together and har-

monized, and under that rule held that chapter 7, Laws of 1927 (23-909, prior to 1955 amendment), and chapter 126, Laws of 1927 (23-1001 et seq.) providing for a method of electing presidential electors, etc., are not in irreconcilable conflict. State ex rel. Foster v. Mountjoy, 83 M 162, 166, 271 P 446.

23-1002. (673.2) Repealed—Chapter 156, Laws of 1965.

Repeal

This section (Sec. 2, Ch. 126, L. 1927; Sec. 13, Ch. 214, L. 1953 (Referendum Measure adopted November 2, 1954, effective December 7, 1954); Sec. 4, Ch. 266, L. 1955), relating to the selection of presidential electors and party officials, was repealed by Sec. 11, Ch. 156, Laws 1965.

23-1003 to 23-1005. (673.3 to 673.5) Repealed—Chapter 266, Laws of 1955.

Repeal

These sections (Secs. 3 to 5, Ch. 126, L. 1927; Sec. 2, Ch. 64, L. 1951), relating to

county conventions, were repealed by Sec. 8, Ch. 266, Laws 1955.

23-1006, 23-1007. (673.6, 673.7) Repealed—Chapter 156, Laws of 1965.

Repeal

These sections (Secs. 6, 7, Ch. 126, L. 1927; Sec. 1, Ch. 55, L. 1953; Secs. 14, 15, Ch. 214, L. 1953 (Referendum Measure adopted November 2, 1954, effective De-

cember 7, 1954); Secs. 5, 6, Ch. 266, L. 1955; Sec. 3, Ch. 274, L. 1959), relating to state party conventions, were repealed by Sec. 11, Ch. 156, Laws 1965.

23-1008. (673.8) Payment of convention expenses. The entire expense of conducting the county and state conventions shall be defrayed by the several political parties, except that each elected delegate or alternate who shall attend any state convention which is held for the purpose of nominating presidential electors and participate therein, shall receive the sum of eight (8) cents per mile for each mile actually traveled by him in going to and returning from said convention, said mileage to be computed by the shortest practicable route, and to be paid out of the general funds of the county in the same manner as other election expenses.

History: En. Sec. 8, Ch. 126, L. 1927; amd. Sec. 16, Ch. 214, L. 1953 (Referendum Measure, adopted November 2, 1954 effective December 7, 1954); amd. Sec. 7, Ch. 266, L. 1955; amd. Sec. 8, Ch. 156, L. 1965.

Collateral References

Counties ≈153½; Elections ≈128. 20 C.J.S. Counties § 236; 29 C.J.S. Elections § 97.

23-1009. Political parties—authority and power. Each political party shall have power to:

- (a) Make its own rules and regulations;
- (b) Provide for and select its own officers;
- (c) Call conventions and provide for the number and qualifications of delegates thereat;
 - (d) Adopt platforms;
 - (e) Provide for selection of delegates to national conventions;
 - (f) Provide for the nomination of presidential electors;
 - (g) Provide for the selection of national committeemen and women;

- Make nominations to fill vacancies occurring among its candidates nominated for offices to be filled by the state at large or by any district consisting of more than one (1) county where such vacancies are caused by death, resignation or removal from the electoral district;
 - (i) Perform all other functions inherent in such an organization.

History: En. Sec. 1, Ch. 156, L. 1965.

CHAPTER 11

BALLOTS, PREPARATION AND FORM

Section 23-1101. Ballots, how printed and distributed. 23-1102. County clerk to provide printed ballots. Municipal clerk to act in municipal elections. 23-1103. 23-1104. Pasters to be printed and distributed where vacancy has been filled. 23-1105. Form, color and size of ballot. Names and party of candidates to be printed on ballot. 23-1106. 23-1107. Arrangement of names-rotation on ballot. 23-1108. Repealed. 23-1109. Columns and material to be printed on ballot. 23-1110. Words to be printed. 23-1111. Order of placement. 23-1112. Ballot to facilitate expression of voter's choice. 23-1113. Blank space and margin.

23-1114. Stub, size and contents.

23-1115. Uniformity of size and printing. County clerk to prepare ballot, when and how. 23-1116.

23-1117. Number of ballots to be provided for each precinct.

23-1101. (677) Ballots, how printed and distributed. All ballots cast in elections for public officers within the state (except school district officers), must be printed and distributed at public expense as provided in this chapter. The printing of ballots and cards of instruction for the elections in each county, and the delivery of the same to the election officers is a county charge, and the expense thereof must be paid in the same manner as the payment of other county expenses, but the expense of printing and delivering the ballots must, in the case of municipal elections, be a charge upon the city or town in which such election is held.

History: En. Sec. 1, p. 135, L. 1889; re-en. Sec. 1350, Pol. C. 1895; re-en. Sec. 541, Rev. C. 1907; re-en. Sec. 677, R. C. M. 1921. Cal. Pol. C. Sec. 1185.

Collateral References Elections 163. 29 C.J.S. Elections § 155.

23-1102. (678) County clerk to provide printed ballots. Except as in this chapter otherwise provided, it shall be the duty of the county clerk of each county to provide printed ballots for every election for public officers in which electors or any of the electors within the county participate, and to cause to be printed on the ballot the names of all candidates, including candidates for chief justice and associate justices of the supreme court and judges of the district courts, whose names have been certified to, or filed with the county clerk, in the manner provided in this chapter. Ballots other than those printed by the respective county clerks, according to the provisions of this chapter, must not be cast or counted in any election. Any elector may write or paste on his ballot the name of any person for whom he desires to vote for any office, but must mark the same as provided in section 23-1210, and when a ballot is so marked it must be counted the same as though the name is printed upon the ballot and marked by the voter. Any voter may take with him into the polling place any printed or written memorandum or paper to assist him in marking or preparing his ballot except as otherwise provided in the chapter.

History: En. Sec. 1351, Pol. C. 1895; re-en. Sec. 542, Rev. C. 1907; re-en. Sec. 678, R. C. M. 1921; amd. Sec. 1, Ch. 203, L. 1937; amd. Sec. 1, Ch. 81, L. 1939. Cal. Pol. C. Sec. 1196.

Use of Uniform Ballot Required

By statute a uniform ballot has been adopted, to be printed and distributed at public expense, and no others than those so provided can be cast or counted. Harrington v. Crichton, 53 M 388, 391, 164

References

In State ex rel. Brooks v. Fransham, 19 M 273, 286, 48 P 1; Sawyer Stores, Inc. v. Mitchell, 103 M 148, 155, 62 P 2d 342.

Collateral References

Elections = 163, 172, 181, 216. 29 C.J.S. Elections §§ 155, 161, 180, 205.

23-1103. (679) Municipal clerk to act in municipal elections. In all municipal elections the city clerk must perform all the duties prescribed for county clerks in this chapter.

History: En. Sec. 1352, Pol. C. 1895; re-en. Sec. 543, Rev. C. 1907; re-en. Sec. 679, R. C. M. 1921.

Collateral References Elections \$2163. 29 C.J.S. Elections \$155.

23-1104. (680) Pasters to be printed and distributed where vacancy has been filled. When any vacancy occurs before election day and after the printing of the ballots, and any person is nominated according to the provisions of this code to fill such vacancy, the officer whose duty it is to have the ballots printed and distributed must thereupon have printed a requisite number of pasters containing the name of the new nominee, and must mail them by registered letter to the judges of election in the various precincts interested in such election, and the judges of election, whose duty it is made by the provisions of this chapter to distribute the ballots, must affix such pasters over the name for which substitution is made in the proper place on each ballot before it is given out to the elector.

History: En. Sec. 1353, Pol. C. 1895; re-en. Sec. 544, Rev. C. 1907; re-en. Sec. 680, R. C. M. 1921.

Collateral References

Elections 182. 29 C.J.S. Elections § 179.

References

State ex rel. Scharnikow v. Hogan, 24 M 397, 403, 62 P 683.

23-1105. (681) Form, color and size of ballot. Ballots for all general elections prepared under the provisions of this chapter must be white in color and of a good quality of paper and the names must be printed thereon in black ink. The ballots used in any one county must be uniform in size, and every ballot must contain the name of every candidate whose nomination for any special office specified in the ballot has been certified or filed according to the provisions of law and no other names, except that the names of candidates for president and vice-president of the United States shall appear on the ballot as provided for by section 23-2101.

History: Ap. p. Sec. 17, p. 139, L. 1889; amd. Sec. 1354, Pol. C. 1895; amd. Sec. 1354, p. 117, L. 1901; amd. Sec. 2 Ch. 88, L. 1907; re-en. Sec. 545, Rev. C. 1907; re-en. Sec. 681, R. C. M. 1921; amd. Sec. 2, Ch. 81, L. 1939; re-en. Sec. 1, Ch. 141, L. 1947; amd. Sec. 1, Ch. 79, L. 1949. Cal. Pol. C. Sec. 1197.

NOTE.—Sections 23-1105, 23-1113 to 23-1116 were originally part of section 545, Revised Codes, 1907, which has been divided.

Cross-References

Constitutional amendments, separate ballot prohibited, sec. 37-105.

Initiative and referendum, ballot, sec. 37-107.

Separate ballot for bonds and levies, sec. 37-107.

Construction

The so-called antifusion statute, consisting of this section and sections 23-1113 to 23-1116, was not impliedly repealed by the Primary Election Law of 1913, and is not unconstitutional. State ex rel. Metcalf v. Wileman, 49 M 436, 437, 143 P 565.

References

State ex rel. Brooks v. Fransham, 19 M 273, 286, 48 P 1; State ex rel. Riley v. Weston, 31 M 218, 226, 78 P 487; Harrington v. Crichton, 53 M 388, 391, 164 P 537.

Collateral References

Elections 166 et seq. 29 C.J.S. Elections § 156 et seq.

Constitutionality of statute relating to election ballots as regards place or number of appearances on the ballots of names of candidates. 78 ALR 398.

Name or form of name to be used in designating candidate on election ballot. 93 ALR 911.

23-1106. Names and party of candidates to be printed on ballot. The name of each candidate nominated shall be printed upon the ballot in but one place and there shall be added after and directly opposite to the name of each candidate nominated, the party or political designation contained in the certificate of nomination of such candidate in not more than three (3) words, except that the political designation of electors for president and vice-president of the United States shall be opposite the whole list thereof, and the names of candidates for chief justice, associate justices, and district court judges shall each be followed by the following words directly underneath the name of the candidate: "Nominated without party designation." It is provided, however, that whenever any person is nominated for the same office by more than one party the designation of the party which first nominated him shall be placed opposite his name unless he declines in writing, one or more of such nominations, or by written election indicates the party designation which he desires printed opposite his name; or if he is nominated by more than one party at the same time he shall within the time fixed by law for filing certificates of nomination, file with the officer with whom his certificate of nomination is required to be filed, a written election indicating the party designation which he desires printed opposite his name, and it shall be so printed. If he shall fail or neglect to file such an election no party designation shall be placed opposite his name.

History: En. Sec. 2, Subd. A, Ch. 81, 1947; amd. Sec. 1, Subd. A, Ch. 79, L. L. 1939; re-en. Sec. 1, Subd. A, Ch. 141, L. 1949.

23-1107. Arrangement of names—rotation on ballot. The names of all candidates shall be arranged alphabetically according to surnames under the appropriate title of the respective offices. It is provided, however, that, while all of the candidates for the particular office shall remain together in the same box, yet the candidates of the two major parties shall appear on the ballot before and above the candidates of the minor parties and independent candidates. For the purpose of designating the candidates of the two major parties, they shall be those candidates of the two parties whose candidates for governor, excluding independent candidates, have been either first or second, (by receiving the highest or next highest number of votes cast for the office of governor at the particular election) the greatest number of times at the next preceding four (4) general elections. In case of a

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tie in the number of first or second places, the determination shall be made by going back enough preceding elections to break the tie and no farther. All other candidates shall be designated as either independent candidates or as belonging to minor parties. When two or more persons are candidates for election to the same office, including presidential and vice-presidential candidates, it shall be the duty of the county clerk in each of the counties of the state to divide the ballot forms provided by the law for the county, into sets so as to provide a substantial rotation of the names of the respective candidates as follows:

He shall divide the whole number of ballot forms for the county into sets equal in number to the greatest number of candidates for any office, and he shall so arrange said sets that the names of the candidates shall, beginning with a form arranged in alphabetical order, (for the purposes of rotation of presidential and vice-presidential candidates, the office of president and vice-president, together with presidential electors shall be considered as a group and alphabetized under the name of the candidate for president), be rotated by removing one name from the top of the list for each office and placing said name or number at the bottom of that list for each successive set of ballot forms; provided, however, that no more than one of said sets shall be used in printing the ballot for use in any one precinct, and that all ballots furnished for use in any precinct shall be of one form and identical in every respect. It is further provided that candidates of the two major parties as hereinabove defined shall be rotated as one group and the candidates of the minor parties and independent candidates shall be rotated as another group so that the candidates of the two major parties for a particular office shall appear on the ballot before and above any candidates of the minor parties or independent candidates.

History: En. Sec. 2, Subd. B, Ch. 81, L. 1947; amd. Sec. 1, Subd. B, Ch. 79, L. 1939; amd. Sec. 1, Subd. B, Ch. 141, L. 1949.

23-1108. Repealed—Chapter 194, Laws of 1967.

Repeal of legislative candidates, was repealed by This section (Sec. 1, Ch. 170, L. 1939), relating to the placement on the ballot

23-1109. Columns and material to be printed on ballot. Each ballot shall contain at the top the stub as provided by section 23-1114, and directly underneath the perforated line shall be the following words in boldface type, "VOTE IN ALL COLUMNS." Each ballot shall contain three (3) columns. Notwithstanding the example in section 23-1112, at the head of the first column to the left shall be the words, "STATE AND NA-TIONAL," in large boldface type, followed by a list of all candidates for state and national offices, including supreme court justices, and district court judges, and members of the legislative assembly, and such list shall progressively continue on to the top of the second column. Following the list of state and national candidates shall be the words "COUNTY AND TOWNSHIP," in large boldface type and beneath such heading shall be listed all candidates for county and township offices and such list shall progressively continue on to the top of the third column. Following the list of county and township candidates shall be the words "INITIATIVES, REFERENDUMS, AND CONSTITUTIONAL AMENDMENTS," in large boldface type, and listed thereunder shall be all proposed constitutional amendments and measures to be voted on by the people at such election which do not involve the creation of any state levy, debt or liability. In case there are no such measures to be submitted, the said heading entitled "INITIATIVES, REFERENDUMS, AND CONSTITUTIONAL AMEND-MENTS," shall be eliminated. Every ballot shall be so printed that all matter heretofore required to be printed on each ballot shall be equally apportioned among the three columns as nearly as possible in the order heretofore and hereafter specified. All such measures which involve the creation of a state levy, debt or liability shall be submitted to the qualified voters upon a separate official ballot in substantial conformity with the form provided for by section 23-1112, for the submission of such measures.

History: En. Sec. 2, Subd. C., Ch. 81, L. 1939; amd. Sec. 1, Subd. C, Ch. 141, L. 1947; amd. Sec. 1, Subd. C, Ch. 79, L. 1949; amd. Sec. 1, Ch. 72, L. 1953; amd. Sec. 6, Ch. 194, L. 1967.

23-1110. Words to be printed. At the bottom of the first and second column to the left shall be the words, "VOTE IN THE NEXT COLUMN." Likewise, at the top of the second column shall be the words "STATE AND NATIONAL (continued)" and at the top of the third column shall be the words "COUNTY AND TOWNSHIP (continued)" to indicate the continuation of the list of candidates under each respective heading to the following column if after all the printed matter is equally apportioned among the three columns, one column is insufficient to contain all the candidates listed under each of the aforementioned headings.

History: En. Sec. 2, Subd. D, Ch. 81, L. 1947; amd. Sec. 1, Subd. D, Ch. 79, L. 1939; re-en. Sec. 1, Subd. D, Ch. 141, L. 1949; amd. Sec. 2, Ch. 72, L. 1953.

23-1111. Order of placement. Notwithstanding the example in section 23-1112, the order of the placement of the offices on the ballot in the first column, or to the left, designated "STATE AND NATIONAL," shall be as follows: "President and vice-president, together with the presidential electors; United States senator; United States representative in Congress; governor: lieutenant governor: secretary of state; attorney general; state treasurer; state auditor; railroad and public service commissioners; state superintendent of public instruction; clerk of the supreme court; chief justice of the supreme court; associate justice or justices of the supreme court: district court judges: state senators; members of the house of representatives;" provided, however, that in the years in which any of such offices are not to be elected, such offices shall not be designated, but the order of those offices to be filled shall maintain their relative positions as herein provided.

In the second column, designated, "COUNTY AND TOWNSHIP," the following order of placement shall be observed: "clerk of district court; county commissioner; county clerk and recorder; sheriff; county attorney; county auditor." Such other offices to be elected shall be placed following the foregoing in the order deemed most appropriate by the county clerk. In the third column constitutional amendments shall come first with refer-

endum and initiative measures following.

History: En. Sec. 2, Subd. E, Ch. 81, L. 1947; amd. Sec. 1, Subd. E, Ch. 79, L. L. 1939; re-en. Sec. 1, Subd. E, Ch. 141, 1949; amd. Sec. 7, Ch. 194, L. 1967.

23-1112. Ballot to facilitate expression of voter's choice. In case of a short term and a long term election for the same office, the long term office shall precede the short term. The ballots shall be so printed as to give each voter a clear opportunity to designate his choice of candidates by a cross mark, (X) in a square at the left of the name of each candidate. Above each group of candidates for each office shall be printed the words designating the particular office in boldface capital letters and directly underneath the words, "VOTE FOR" followed by the number to be elected to such office. As nearly as possible the ballot shall be in the following form:

(Stub hereinafter provided for by Section 23-1114)

Perforated Line VOTE IN ALL COLUMNS STATE AND NATIONAL COUNTY AND TOWNSHIP STATE AND NATIONAL (Continued) (Continued) (Continued in like man-ner for all County and Township Officers.) FOR PRESIDENTIAL FOR CHIEF JUSTICE OF ELECTORS TO VOTE FOR PRESIDENT AND VICE-PRESIDENT OF THE THE SUPREME COURT VOTE FOR ONE UNITED STATES ☐ Richard K. O'Doe (Nominated without VOTE FOR ONE INITIATIVES, REFEREN-DUMS AND CONSTITU-TIONAL AMENDMENTS party designation.) Democrat for President of the United ☐ Tom Row (Nominated without States JOHN DOE JOHN DOE For Vice-President of the United States RICHARD ROE party designation.) CONSTITUTIONAL **AMENDMENTS** For Presidential Electors: Jane Doe; Helen Doe; Pete Moe; Milton Moe. (Continued in like manner for Associate Justice and Judges of the District Court.) ☐ For the Amendment Against the Amendment (Same with other candidates for President and Vice-President together COUNTY AND TOWNSHIP with blank space for FOR STATE SENATOR REFERENDUM NO. 1 write-in.) VOTE FOR ONE FOR UNITED STATES ☐ Bill Doe Republican SENATOR ☐ John Roe Democrat VOTE FOR ONE For Referendum No. 1 Democrat Republican ☐ Against Referendum No. 1 Frank Roa Guy Doe FOR MEMBER OF THE HOUSE OF REPRESENT-(Same for Congressmen, Governor, Lieut, Gover-nor, Secretary of State, Attorney General, State Treasurer, State Audi-tor, Railroad and Public Service Commissioners, State Supported ATIVES INITIATIVE NO. 1 VOTE FOR TWO Al Johnson Republican ☐ Jim Sparks Democrat ☐ Jack Smith Republican State Superintendent of Public Instruction, and Clerk of the Supreme ☐ For Initiative No. 1 ☐ Dan Martin Democrat ☐ Against Initiative No. 1 Court.) Vote in Next Column Vote in Next Column

History: En. Sec. 2, Subd. F, Ch. 81, L. 1939; re-en. Sec. 1, Subd. F, Ch. 141, L. 1947; amd. Sec. 1, Subd. F, Ch. 79, L. 1949; amd. Sec. 3, Ch. 72, L. 1953.

Cross-Reference

Legislative candidates to be listed under "State and National" column, notwithstanding this section, secs. 23-1109, 23-1111.

23-1113. (683) Blank space and margin. Below the names of candidates for each office there must be left a blank space large enough to contain as many written names of candidates as there are persons to be elected. There must be a margin on each side of at least half an inch in width, and a reasonable space between the names printed thereon, so that the voter may clearly indicate, in the way hereinafter provided, the candidate or candidates for whom he wishes to cast his ballot.

History: Ap. p. Sec. 17, p. 139, L. 1889; amd. Sec. 1354, Pol. C. 1895; amd. Sec. 1354, p. 117, L. 1901; amd. Sec. 2, Ch. 88, L. 1907; re-en. Sec. 545, Rev. C. 1907; re-en. Sec. 683, R. C. M. 1921. Cal. Pol. C. Sec. 1197.

Collateral References Elections \$\infty 170. 29 C.J.S. Elections \\$ 156.

23-1114. (684) Stub, size and contents. The ballot shall be printed on the same leaf with a stub, and separated therefrom by a perforated line. The part above the perforated line, designated as the stub, shall extend the entire width of the ballot, and shall be of sufficient depth to allow the following instructions to voters to be printed thereon, such depth to be not less than two inches from the perforated line to the top thereof, upon the face of which stub shall be printed, in type known as brevier capitals, the following: "This ballot should be marked with an 'X' in the square before the name of each person or candidate for whom the elector intends to vote. In cases of a ballot containing a constitutional amendment, or other question to be submitted to a vote of the people, by marking an 'X' in the square before the answer of the question or amendment submitted. The elector may write in the blank spaces, or paste over another name, the name of any person for whom he wishes to vote, and vote for such person by marking an 'X' in the square before such name." On the back of the stub shall be printed or stamped by the county clerk, or other officer whose duty it is to provide the ballots, the consecutive number of the ballot, beginning with number "1," and increasing in regular numerical order to the total number of ballots required for the precinct.

History: Ap. p. Sec. 17, p. 139, L. 1889; amd. Sec. 1354, Pol. C. 1895; amd. Sec. 1354, p. 117, L. 1901; amd. Sec. 2, Ch. 88, L. 1907; re-en. Sec. 545, Rev. C. 1907; re-en. Sec. 684, R. C. M. 1921. Cal. Pol. C. Sec. 1197.

Collateral References Elections €= 168, 176. 29 C.J.S. Elections §§ 159, 171.

23-1115. (685) Uniformity of size and printing. All of the official ballots of the same sort, prepared by any officer or board for the same balloting place, shall be of precisely the same size, arrangement, quality and tint of paper, and kind of type, and shall be printed in black ink of the same tint, so that when the stubs numbered as aforesaid shall be detached therefrom, it shall be impossible to distinguish any one of the ballots from the other ballots of the same sort, and the names of all candidates printed upon the ballots shall be in type of the same size and character.

History: Ap. p. Sec. 17, p. 139, L. 1889; amd. Sec. 1354, Pol. C. 1895; amd. Sec. 1354, p. 117, L. 1901; amd. Sec. 2, Ch. 88, L. 1907; re-en. Sec. 545, Rev. C. 1907; re-en. Sec. 685, R. C. M. 1921. Cal. Pol. C. Sec. 1197.

Collateral References Elections \$\infty 166. 29 C.J.S. Elections § 156. 26 Am. Jur. 2d 38, Elections, § 205.

23-1116. (686) County clerk to prepare ballot, when and how. Whenever the secretary of state has duly certified to the county clerk any question to be submitted to the vote of the people, the county clerk must print the ballot in such form as will enable the electors to vote upon the question so presented in the manner provided by law. The county clerk must also prepare the necessary ballots whenever any question is required by law to be submitted to the electors of any locality, and any of the electors of the state generally, except that as to all questions submitted to the electors of a municipal corporation alone the city clerk must prepare the necessarv ballots.

History: Ap. p. Sec. 17, p. 139, L. 1889; amd. Sec. 1354, Pol. C. 1895; amd. Sec. 1354, p. 117, L. 1901; amd. Sec. 2, Ch. 88, L. 1907; re-en. Sec. 545, Rev. C. 1907; re-en. Sec. 686, R. C. M. 1921. Cal. Pol. C. Sec. 1197.

Collateral References Elections 275. 29 C.J.S. Elections § 170.

23-1117. (687) Number of ballots to be provided for each precinct. The county clerk must provide for each election precinct in the county sufficient ballots for the electors registered in the precinct. If there is no registry in the precinct, the county clerk must provide ballots equal to the number of electors who voted at the last preceding election in the precinct, unless in the judgment of the county clerk a greater number be needed, but in no case to exceed one and one-half times as many as the number of registered voters in the precinct. He must keep a record in his office, showing the exact number of ballots, that are delivered to the judges of each precinct. In municipal elections it is the duty of the city clerk to provide ballots as specified in this section.

History: Ap. p. Sec. 1355, Pol. C. 1895; amd. Sec. 3, Ch. 88, L. 1907; re-en. Sec. 546, Rev. C. 1907; re-en. Sec. 687, R. C. M. 1921; amd. Sec. 1, Ch. 16, L. 1925; amd. Sec. 9, Ch. 156, L. 1965. Cal. Pol. C. Sec. 1199.

Collateral References Elections == 163. 29 C.J.S. Elections § 155.

CHAPTER 12

CONDUCTING ELECTIONS—THE POLLS—VOTING AND BALLOTS

Section 23-1201. Voting, to commence when and continue how long.

Time of opening and closing of polls. 23-1202.

23-1203. When polls for special elections shall open and close.

23-1204. Proclamation at opening and thirty minutes before closing polls.

Proclamation at closing polls. 23-1205.

23-1206. Sufficient booths or compartments must be furnished.

23-1207. Elector to cast his ballot without interference.

23-1208. 23-1208. Expenses of providing places for election. 23-1209. Delivery of official ballots to elector.

23-1210. Method of voting.

23-1211. Only one person to occupy booth, and no longer than five minutes.

23-1212. Spoiled ballot.

23-1213. Judges may aid disabled elector.

23-1214. Manner of voting.

23-1215. Announcement of voter's name.

23-1216. Putting ballot in box.

23-1217. Record that person has voted, how kept.

23-1218. Marking precinct register book when elector has voted-procedure.

23-1219. List of voters.

23-1220. Grounds of challenge.

23-1221. Proceedings on challenges for want of identity.

23-1222. Proceedings on challenges for having voted before.

23-1223. Proceedings on challenges on ground of conviction of crime.

23-1224. Challenges, how determined.

23-1225. Trial of challenges.

23-1226. If a person refuses to be sworn, vote to be rejected.

23-1227. Proceedings upon determination of challenges.

23-1228. List of challenges to be kept.

23-1201. (688) Voting, to commence when and continue how long. Voting may commence as soon as the polls are open, and may be continued during all the time the polls remain open.

History: En. Sec. 1365, Pol. C. 1895; re-en. Sec. 556, Rev. C. 1907; re-en. Sec. 688, R. C. M. 1921. Cal. Pol. C. Sec. 1224. Collateral References Elections \$205. 29 C.J.S. Elections \$198.

References

Maddox v. Board of State Canvassers, 116 M 217, 223, 149 P 2d 112.

23-1202. (689) Time of opening and closing of polls. The polls must be opened at eight o'clock on the morning of election day and must be kept open continuously until eight o'clock p. m. of said day, when the same must be closed; provided that in precincts having less than one hundred (100) registered electors the polls must be opened at one o'clock in the afternoon of election day and must be kept open continuously until eight o'clock p. m. of said day, when they must be closed; provided, further, that whenever all registered electors in any precinct have voted the polls shall be immediately closed.

History: Ap. p. Sec. 11, p. 462, Cod. Stat. 1871; re-en. Sec. 11, p. 73, L. 1876; re-en. Sec. 525, 5th Div. Rev. Stat. 1879; re-en. Sec. 1017, 5th Div. Comp. Stat. 1887; amd. Sec. 1290, Pol. C. 1895; re-en. Sec. 514, Rev. C. 1907; re-en. Sec. 689, R. C. M. 1921; amd. Sec. 1, Ch. 3, L. 1935; amd. Sec. 1, Ch. 207, L. 1955. Cal. Pol. C. Sec. 1160.

References

Maddox v. Board of State Canvassers, 116 M 217, 223, 149 P 2d 112.

Collateral References

Elections 206-208.
29 C.J.S. Elections § 198.
26 Am. Jur. 2d 60, Elections, § 227.

23-1203. When polls for special elections shall open and close. Whenever any special election is held for the purpose of submitting to the qualified electors of any county, high school district, school district, city or town, the question of incurring an indebtedness for any purpose, issuing bonds or making a special or additional levy for any purpose, the polls shall be open at 12 o'clock noon and shall remain open until 8 o'clock p. m. of the same day; provided, that if any such special election is held on the same day as any general, county, school or municipal election or any primary election and at the same polling places with the same judges and clerks of election, then the polls shall be opened and closed at the same hours as the polls for such general, county, school, municipal or primary election.

History: En. Sec. 1, Ch. 2, L. 1937.

Collateral References Elections \$\infty 206, 208. 29 C.J.S. Elections \\$ 198.

23-1204. (690) Proclamation at opening and thirty minutes before closing polls. Before the judges receive any ballots they must cause it to

be proclaimed aloud at the place of election that the polls are open, and thirty minutes before the closing of the polls proclamation must be made that the polls will close in one-half hour.

Kistory: Ap. p. Sec. 11, p. 462, Cod. Stat. 1871; re-en. Sec. 11, p. 73, L. 1876; re-en. Sec. 525, 5th Div. Rev. Stat. 1879; re-en. Sec. 1017, 5th Div. Comp. Stat. 1887;

amd. Sec. 1291, Pol. C. 1895; re-en. Sec. 515, Rev. C. 1907; re-en. Sec. 690, R. C. M 1921. Cal. Pol. C. Sec. 1163.

23-1205. (691) Proclamation at closing polls. When polls are closed, that fact must be proclaimed aloud at the place of election; and after such proclamation no ballots must be received.

History: Ap. p. Sec. 11, p. 462, Cod. Stat. 1871; re-en. Sec. 11, p. 73, L. 1876; re-en. Sec. 525, 5th Div. Rev. Stat. 1879; re-en. Sec. 1017, 5th Div. Comp. Stat. 1887;

amd. Sec. 1292, Pol. C. 1895; re-en. Sec. 516, Rev. C. 1907; re-en. Sec. 691, R. C. M. 1921. Cal Pol. C. Sec. 1164.

23-1206. (692) Sufficient booths or compartments must be furnished. All officers upon whom is imposed by law the duty of designating the polling places must provide in each polling place designated by them, a sufficient number of places, booths, or compartments, each booth or compartment to be furnished with a door or curtain sufficient in character to screen the voter from observation, and must be furnished with such supplies and conveniences as shall enable the elector to prepare his ballot for voting, and in which electors must mark their ballots, screened from observation, and a guardrail so constructed that only persons within such rail can approach within ten feet of the ballot boxes, or the places, booths, or compartments herein provided for. The number of such places, booths, or compartments must not be less than one for every fifty electors, or fraction thereof, registered in the precinct. In precincts containing less than twenty-five registered voters, the election may be conducted under the provisions of this chapter without the preparation of such booths or compartments, as required by this section.

History: En. Sec. 22, p. 141, L. 1889; re-en. Sec. 1357, p. 118, L. 1901; re-en. Sec. 548, Rev. C. 1907; re-en. Sec. 692, R. C. M. 1921. Cal. Pol. C. Sec. 1203.

Collateral References Elections \$\infty 201. 29 C.J.S. Elections § 195.

23-1207. (693) Elector to cast his ballot without interference. person other than electors engaged in receiving, preparing, or depositing their ballots, or a person present for the purpose of challenging the vote of an elector about to cast his ballot, is permitted to be within said rail; and in cases of small precincts where places, booths, or compartments are not required, no person engaged in preparing his ballot shall, in any way, be interfered with by any person, unless it be someone authorized by the provisions of this chapter to assist him in preparing his ballot: nor shall any officer of election do any electioneering on election day. No person whatsoever shall do any electioneering on election day, within any polling place, or any building in which an election is being held, or within twentyfive feet thereof; said space of twenty-five feet to be protected by ropes and kept free of trespassers; nor shall any person obstruct the doors or entries thereto, or prevent free ingress to and egress from said building. Any election officer, sheriff, constable, or other peace officer is hereby authorized and empowered, and it is hereby made his duty, to clear the passageway, and prevent such obstruction, and to arrest any person so doing.

(2)No person shall remove any ballot from the polling place before the closing of the polls. No person shall show his ballot after it is marked, to any person, in such a way as to reveal the contents thereof, or the name of the candidate or candidates for whom he has marked his vote; nor shall any person solicit the elector to show the same; nor shall any person, except the judge of election, receive from any elector a ballot prepared for voting. No elector shall receive a ballot from any other person than one of the judges of election having charge of the ballots; nor shall any person other than such judge of election deliver a ballot to such elector. No elector shall vote, or offer to vote, any ballot except such as he has received from the judges of election having charge of the ballots. No elector shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him. Every elector who does not vote a ballot delivered to him by the judges of election having charge of the ballots, shall, before leaving the polling place, return such ballot to such

History: Ap. p. Sec. 22, p. 141, L. 1889; re-en. Sec. 1358, Pol. C. 1895; amd. Sec. 1358, p. 118, L. 1901; re-en. Sec. 549, Rev. C. 1907; re-en. Sec. 693, R. C. M. 1921.Cal. Pol. C. Sec. 1215.

Cross-References

Disclosing contents of ballot after marking, penalty, sec. 94-1414.

Electioneering by election officials, penalty, 94-1413.

References

Lane v. Bailey, 29 M 548, 560, 75 P 191.

Collateral References

Elections = 211, 227 (5-9), 233, 234. 29 C.J.S. Elections §§ 194, 196, 200, 208, 219, 220.

26 Am. Jur. 2d 65, Elections, § 234.

(694) Expenses of providing places for election. The expense of providing such places or compartments, ropes, and guardrails is a public charge, and must be provided for in the same manner as the other election expenses.

History: En. Sec. 1359, p. 119, L. 1901; re-en. Sec. 550, Rev. C. 1907; re-en. Sec. 694, R. C. M. 1921.

Collateral References Elections 201. 29 C.J.S. Elections § 195.

23-1209. (695) Delivery of official ballots to elector. At any election the judges of election must designate two of their number whose duty it is to deliver ballots to the qualified electors. Before delivering any ballot to an elector, the said judges must print on the back, and near the top of the ballot, with the rubber or other stamp provided for the purpose, the designation "official ballot" and the other words on same, as provided for in section 23-705 of this code; and the clerks must enter on the poll lists the name of such elector and the number of the stub attached to the ballot given him. Each qualified elector must be entitled to receive from the judges one ballot.

History: Ap. p. Sec. 23, p. 141, L. 1889; amd. Sec. 1360, Pol. C. 1895; amd. Sec. 4, Ch. 88, L. 1907; re-en. Sec. 551, Rev. C. 1907; re-en. Sec. 695, R. C. M. 1921.

Stamping of Official Ballot

Where ballots had been delivered to electors by the judges of election with the official stamp apparently in the place in which the law requires it to be, although in reality it was on the stub instead of on the ballot proper, the act of the judges in removing the stamp with the stub—thus leaving the ballot without the stamp—did not render the ballot void. Harrington v. Crichton, 53 M 388, 164 P 537.

References

State ex rel. Brooks v. Fransham, 19 M 273, 287, 48 P 1; State ex rel. Riley v. District Court, 103 M 576, 588, 64 P 2d 115.

Collateral References

Elections 218. 29 C.J.S. Elections § 204.

23-1210. (696) Method of voting. On receipt of his ballot the elector must forthwith, without leaving the polling place and within the guardrail provided, and alone, retire to one of the places, booths, or compartments, if such are provided, and prepare his ballot. He shall prepare his ballot by marking an "X" in the square before the name of the person or persons for whom he intends to vote. In case of a ballot containing a constitutional amendment, or other question to be submitted to the vote of the people, by marking an "X" in the square before the answer of the question or amendment submitted. The elector may write in the blank space or paste over any other name the name of any person for whom he wishes to vote, and vote for such person by marking an "X" before such name. No elector is at liberty to use or bring into the polling place any unofficial sample ballot. After preparing his ballot the elector must fold it so the face of the ballot will be concealed and so that the endorsements stamped thereon may be seen, and hand the same to the judges in charge of the ballot box, who shall announce the name of the elector and the printed or stamped number on the stub of the official ballot so delivered to him, in a loud and distinct tone of voice. If such elector be entitled then and there to vote, and if such printed or stamped number is the same as that entered on the pollbooks as the number on the stub of the official ballot last delivered to him by the ballot judge, such judge shall receive such ballot, and, after removing the stub therefrom in plain sight of the elector, and without removing any other part of the ballot, or in any way exposing any part of the face thereof below the stub, shall deposit each ballot in the proper ballot box for the reception of voted ballots, and the stubs in a box for detached ballot stubs. Upon voting, the elector shall forthwith pass outside the guardrail, unless he be one of the persons authorized to remain within the guardrail for other purposes than voting.

History: Ap. p. Sec. 24, p. 142, L. 1889; amd. Sec. 1361, Pol. C. 1895; amd. Sec. 1361, p. 119, L. 1901; amd. Sec. 5, Ch. 88, L. 1907; re-en. Sec. 552, Rev. C. 1907; re-en. Sec. 696, R. C. M. 1921; amd. Sec. 7, Ch. 64, L. 1959. Cal. Pol. C. Sec. 1205.

Acts of Election Officers

A ballot properly marked, but from which the stub has not been detached by the ballot judge as required by this section, should be counted; a voter is not to be disfranchised by the errors or wrongful acts of election officers. Carwile v. Jones, 38 M 590, 599, 101 P 153.

A ballot bearing the endorsement: "Voted by H. and M. (judges election) for illegibility of voter," was not void on the ground that the reason given for assisting the voter was not one recognized

by law, since section 23-1213 does not require the judges to certify the reason for assisting an elector, and the words "for illegibility of voter" were therefore surplusage; and in the absence of a showing why they gave assistance, it will be presumed that they regularly performed their official duties. Carwile v. Jones, 38 M 590, 599, 101 P 153.

Directory, Not Mandatory—Check Mark Counted

The provision of this section that a ballot should be marked by an "X" in the square is directory and not mandatory, and in the absence of a further provision that unless so marked the ballot shall not be counted, a ballot upon which the elector marked all squares with a check mark (V) instead of an "X" should have been

counted for contestant, there being nothing to indicate an attempt to mark the ballot for identification purposes. Peterson v. Billings, 109 M 390, 395, 96 P 2d 922.

Marking of Ballot

In an election contest, the court properly refused to count for a candidate ballots marked as follows: (1) Where the cross was placed after the candidate's name and entirely without his party column; (2) where perpendicular lines were drawn through the names in one party column, but no cross was placed before the candidate's name; and (3) where his name was written in one party column, but no cross marked in the square before the name. In neither instance was there substantial, or any, compliance with the provisions of this section. Carwile v. Jones, 38 M 590, 595, 101 P 153.

In an election contest, the court properly refused to count a ballot for a candidate which was marked by crossing out all the names in other party columns, but which failed to show an "X" before his name. While the intention of the voter is generally a very material consideration, he must express his intention substantially as indicated by the statute. Carwile v.

Jones, 38 M 590, 595, 101 P 153.

Where the crossmark was placed after the candidate's name but within his party column, the ballot was void, since the elector did not substantially comply with the requirement of this section relative to placing the mark before the name. Carwile v. Jones, 38 M 590, 595, 101 P 153.

Any mark within the square before the candidate's name, which can be said to be a crossing of two lines, will answer the requirements of the statute that the elector must place an "X" in such square; and in the absence of anything to indicate a purpose on his part to identify his ballot by the use of a third line within the square, a defect in the mark is not sufficient to vitiate the ballot. Carwile v. Jones, 38 M 590, 595, 101 P 153, explained in 109 M 390, 393, 396, 96 P 2d 922.

Voting Is an Affirmative Act, Vote for Deceased Candidate Not Counted as Opposed to Write-in

The casting of a ballot at an election of public officers is an affirmative, not a negative act—an act done with intention of voting for someone; hence if it is the purpose of voters to defeat a certain candidate, that purpose can be accomplished only by voting for some person in opposition to him, and not by voting for a person who died some weeks before election with the expectation that the vote cast for him would be counted as opposed to the person sought to be defeated; one who has died is no longer a person for whom, under section 2, article IX of the constitution, a voter may cast his ballot. State ex rel. Wolff v. Geurkink, 111 M 417, 426, 109 P 2d 1094, 133 ALR 304.

References

State ex rel. Brooks v. Fransham, 19 M 273, 292, 48 P 1; Harrington v. Crichton, 53 M 388, 164 P 537; State ex rel. Riley v. District Court, 103 M 576, 588, 64 P 2d 115; Maddox v. Board of State Canvassers, 16 M 217, 223, 149 P 2d 112.

Collateral References

Elections \$\sim 219, 221.
29 C.J.S. Elections \\$\\$ 206, 207.
26 Am. Jur. 2d 65, Elections, \\$\\$ 234.

23-1211. (697) Only one person to occupy booth, and no longer than five minutes. No more than one person must be allowed to occupy any one booth at one time, and no person must remain in or occupy a booth longer than may be necessary to prepare his ballot, and in no event longer than five minutes, if the other booths or compartments are occupied.

History: En. Sec. 25, p. 142, L. 1889; re-en. Sec. 1362, Pol. C. 1895; re-en. Sec. 553, Rev. C. 1907; re-en. Sec. 697, R. C. M. 1921. Cal. Pol. C. Sec. 1206.

Collateral References

Elections \$227 (7), 228. 29 C.J.S. Elections \$195.

23-1212. (698) Spoiled ballot. Any elector who by accident or mistake spoils his ballot, may, on returning said spoiled ballot, receive another in place thereof.

History: En. Sec. 26, p. 142, L. 1889; re-en. Sec. 1363, Pol. C. 1895; re-en. Sec. 554, Rev. C. 1907; re-en. Sec. 698, R. C. M. 1921. Cal. Pol. C. Sec. 1207.

Collateral References Elections 218. 29 C.J.S. Elections § 204.

23-1213. (699) Judges may aid disabled elector. Any elector who declares to the judges of election, or when it appears to the judges of elec-

tion that he cannot read or write, or that because of blindness or other physical disability he is unable to mark his ballot, but for no other cause, must, upon request, receive the assistance of two of the judges, who shall represent different parties, in the marking thereof, and said disabled elector may request that any qualified elector whom he designates to the judges, and in whom he has trust and confidence, shall also be permitted to aid him in the marking of his ballot, and such judges must certify on the official register opposite name of such disabled elector that it was so marked with their assistance, and indicate the name of the person if any of whom he requested and received assistance, and neither the judges nor, if such is the case, the person who aided him, must thereafter give information regarding the same. The judges must require such declaration of disability to be made by the elector under oath before them, and they are hereby authorized to administer the same. No elector other than the one who may, because of his inability to read or write, or of his blindness or physical disability, be unable to mark his ballot, must divulge to anyone within the polling place the name of any candidate for whom he intends to vote, or, other than herein specifically allowed, ask or receive the assistance of any person within the polling place in the preparation of his ballot.

History: Ap. p. Sec. 27, p. 142, L. 1889; amd. Sec. 1364, Pol. C. 1895; amd. Sec. 1364, p. 120, L. 1901; re-en. Sec. 555, Rev. C. 1907; re-en. Sec. 699, R. C. M. 1921; amd. Sec. 1, Ch. 32, L. 1959; amd. Sec. 1, Ch. 77, L. 1961. Cal. Pol. C. Sec. 1208.

References

Carwile v. Jones, 38 M 590, 597, 101 P 153; Gervais v. Rolfe, 57 M 209, 212, 187 P 899.

Collateral References

Elections \$220. 29 C.J.S. Elections \$208. 26 Am. Jur. 2d 68, Elections, \$238.

DECISIONS UNDER FORMER LAW

Endorsement of Ballot by Judges

Where it appeared in an election contest that a voter's ballot had been endorsed by the judges of election, as required by section 1364, Pol. C. 1895, as

amended in 1901, it was necessary to show that it could not thereby be identified, in order to let in, as secondary evidence, testimony as to how he voted. Lane v. Bailey, 29 M 548, 560, 75 P 191.

23-1214. (700) Manner of voting. No person whomsoever, except a judge or judges of election, shall put into the ballot box any ballot, or any paper resembling a ballot, or any other thing whatsoever. Any person or persons violating the foregoing provision shall be guilty of a misdemeanor. Any judge or judges of election who shall knowingly permit a violation of any of the provisions in this section set forth shall be guilty of a felony and be punishable as in this section hereinbefore specified. The person offering to vote must hand his ballot to the judge, and announce his name, and in incorporated cities and towns any such person must also give the name of the street, avenue, or location of his residence, and the number thereof, if it be numbered, or such clear and definite description of the place of such residence as shall definitely fix the same.

History: En. Sec. 1366, Pol. C. 1895; re-en. Sec. 557, Rev. C. 1907; re-en. Sec. 700, R. C. M. 1921; amd. Sec. 1, Ch. 111, L. 1937. Cal. Pol. C. Sec. 1225.

References

Goodell v. Judith Basin County, 70 M 222, 233, 224 P 1110.

Collateral References

Elections 221, 314. 29 C.J.S. Elections §§ 207, 327. 23-1215. (701) Announcement of voter's name. The judges must receive the ballot, and before depositing it in the ballot box must, in an audible tone of voice, announce the name, and in incorporated towns and cities the judges must also announce the residence of the person voting, and the same must be recorded on each pollbook.

History: En. Sec. 1367, Pol. C. 1895; re-en. Sec. 558, Rev. C. 1907; re-en. Sec. 701, R. C. M. 1921. Cal. Pol. C. Sec. 1226. References

Goodell v. Judith Basin County, 70 M 223, 233, 224 P 1110.

23-1216. (702) Putting ballot in box. If the name be found on the official register in use at the precinct where the vote is offered, or if the person offering to vote produce and surrender a proper registry certificate, and the vote is not rejected, upon a challenge taken, the judges must immediately and publicly, in the presence of all the judges, place the ballot, without opening or examining the same, in the ballot box.

History: En. Sec. 1368, Pol. C. 1895; re-en. Sec. 559, Rev. C. 1907; re-en. Sec. 702, R. C. M. 1921. Cal. Pol. C. Sec. 1227. References

Goodell v. Judith Basin County, 70 M 222, 233, 224 P 1110.

23-1217. (703) Record that person has voted, how kept. When the ballot has been placed in the box, one of the judges must write the word "Voted" opposite the number of the person on the check list for the precinct.

History: En. Sec. 1369, Pol. C. 1895; re-en. Sec. 560, Rev. C. 1907; re-en. Sec. 703, R. C. M. 1921, Cal. Pol. C. Sec. 1228.

References

Maddox v. Board of State Canvassers, 116 M 217, 223, 149 P 2d 112.

Deposit of Ballot in Ballot Box

Under this section the act of voting is not completed until the ballot is deposited in the ballot box. Goodell v. Judith Basin County, 70 M 222, 233, 224 P 1110.

Collateral References

Elections 216. 29 C.J.S. Elections § 205.

23-1218. (704) Marking precinct register book when elector has voted —procedure. The judges of election in each precinct, at every general or special election, shall, in the precinct register book, which shall be certified to them by the county clerk, mark a cross (X) upon the line opposite to the name of the elector. Before any elector is permitted to vote the judges of election shall require the elector to sign his name upon one of the precinct register books, designated by the county clerk for that purpose, and in a column reserved in the said precinct books for the signature of electors. If the elector is not able to sign his name, he shall be required by the judges to produce two freeholders who shall make an affidavit before the judges of election, or one of them, in substantially the following form:

The State of Montana, County of......

"We, the undersigned witnesses, do swear that our names and signatures are genuine, and that we are each personally acquainted with _______ (the name of the elector), and that we know that he is residing at ______, and that we believe that he is entitled to vote at this election, and that we are each freeholders in the county," which affidavit shall be filed by the judges, and returned by

them to the county clerk, with the return of the election; one of the judges shall thereupon write the elector's name, and note the fact of his inability to sign, and the names of the two freeholders who made the affidavit herein provided for. If the elector fails or refuses to sign his name, and, if unable to write, fails to procure two freeholders who will take the oath herein provided, he shall not be allowed to vote. Immediately after the election and canvass of the returns, the judges of election shall deliver to the county clerk the copy of said official precinet register, sealed, with the election returns and pollbook, which have been used at said election.

History: En. Sec. 26, Ch. 113, L. 1911; amd. Sec. 26, Ch. 74, L. 1913; amd. Sec. 26, Ch. 122, L. 1915; re-en. Sec. 704, R. C. M. 1921.

NOTE.—The foregoing section appears as section 23-524. It is also printed here because of its application to the subject embraced in this chapter.

References

Thompson v. Chapin, 64 M 376, 383, 209 P 1060.

Collateral References
Elections©212.
29 C.J.S. Elections § 197.

23-1219. (705) List of voters. Each clerk must keep a list of persons voting, and the name of each person who votes must be entered thereon and numbered in the order voting. Such list is known as the pollbook.

History: En. Sec. 1370, Pol. C. 1895; re-en. Sec. 561, Rev. C. 1907; re-en. Sec. 705, R. C. M. 1921; amd. Sec. 8, Ch. 64, L. 1959. Cal. Pol. C. Sec. 1229. Collateral References Elections©212. 29 C.J.S. Elections § 197.

23-1220. (706) Grounds of challenge. Any person offering to vote may be orally challenged by any elector of the county, upon either or all of the following grounds:

- 1. That he is not the person whose name appears on the register or check list.
 - 2. That he is an idiot or insane person.
 - 3. That he has voted before that day.
 - 4. That he has been convicted of a felony and not pardoned.

History: En. Sec. 1371, Pol. C. 1895; re-en. Sec. 562, Rev. C. 1907; re-en. Sec. 706, R. C. M. 1921. Cal. Pol. C. Sec. 1230.

Collateral References
Elections = 223.
29 C.J.S. Elections § 209.
26 Am. Jur. 2d 67, Elections, § 237.

23-1221. (707) Proceedings on challenges for want of identity. If the challenge is on the ground that he is not the person whose name appears on the official register, the judges must tender him the following oath:

"You do swear (or affirm) that you are the person whose name is entered on the official register and check list."

History: En. Sec. 1372, Pol. C. 1895; re-en. Sec. 563, Rev. C. 1907; re-en. Sec. 707, R. C. M. 1921. Cal. Pol. C. Sec. 1231.

23-1222. (708) Proceedings on challenges for having voted before. If the challenge is on the ground that the person challenged has voted before that day, the judges must tender to the person challenged this oath:

"You do swear (or affirm) that you have not before voted this day."

History: En. Sec. 1373, Pol. C. 1895; re-en. Sec. 564, Rev. C. 1907; re-en. Sec. 708, R. C. M. 1921. Cal. Pol. C. Sec. 1234. 23-1223. (709) Proceedings on challenges on ground of conviction of crime. If the challenge is on the ground that the person challenged has been convicted of a felony, the judges must tender him the following oath:

"You do swear (or affirm) that you have not been convicted of a felony."

History: En. Sec. 1374, Pol. C. 1895; re-en. Sec. 565, Rev. C. 1907; re-en. Sec. 709, R. C. M. 1921. Cal. Pol. C. Sec. 1235.

- 23-1224. (710) Challenges, how determined. Challenges upon the grounds either:
- 1. That the person challenged is not the person whose name appears on the official register; or

That the person has before voted that day, are determined in favor of the person challenged by his taking the oath tendered.

2. A challenge upon the ground that the person challenged has been convicted of a felony and not pardoned must be determined in favor of the person challenged on his taking the oath tendered, unless the fact of conviction be proved by the production of an authenticated copy of the record or by the oral testimony of two witnesses. If the person challenged asserts that he has been convicted of a felony and pardoned therefor, he must exhibit his pardon or a proper certified copy thereof to the judges, and if the pardon be found sufficient, the judges must tender to him the following oath: "You do swear that you have not been convicted of any felony other than that for which a pardon is now exhibited." Upon taking this oath the person challenged must be permitted to vote if otherwise qualified, unless a conviction of some other felony be proved, as in this section provided for the proof of a conviction.

History: En. Sec. 1375, Pol. C. 1895; re-en. Sec. 566, Rev. C. 1907; re-en. Sec. 710, R. C. M. 1921, Cal. Pol. C. Sec. 1236.

23-1225. (711) Trial of challenges. Challenges for causes other than those specified in the preceding section must be tried and determined by the judges of election at the time of the challenge.

History: En. Sec. 1376, Pol. C. 1895; re-en. Sec. 567, Rev. C. 1907; re-en. Sec. 711, R. C. M. 1921. Cal. Pol. C. Sec. 1237.

23-1226. (712) If a person refuses to be sworn, vote to be rejected. If any person challenged refuses to take the oaths tendered, or refuses to be sworn and to answer the questions touching the matter of residence, he must not be allowed to vote.

History: En. Sec. 1377, Pol. C. 1895; re-en. Sec. 568, Rev. C. 1907; re-en. Sec. 712, R. C. M. 1921. Cal. Pol. C. Sec. 1238. Collateral References Elections 224. 29 C.J.S. Elections § 211.

23-1227. (713) Proceedings upon determination of challenges. If the challenge is determined against the person offering to vote, the ballot must, without examination, be destroyed by the judges in the presence of the person offering the same; if determined in his favor, the ballot must be deposited in the ballot box.

History: En. Sec. 1378, Pol. C. 1895; re-en. Sec. 569, Rev. C. 1907; re-en. Sec. 713, R. C. M. 1921. Cal. Pol. C. Sec. 1242. Collateral References Elections © 224. 29 C.J.S. Elections § 211.

23-1228. (714) List of challenges to be kept. The judges must cause each of the clerks to keep a list showing:

1. The names of all persons challenged.

The grounds of such challenges.

The determination of the judges upon the challenge.

History: En. Sec. 1379, Pol. C. 1895; re-en. Sec. 570, Rev. C. 1907; re-en. Sec. 714, R. C. M. 1921. Cal. Pol. C. Sec. 1243.

CHAPTER 13

VOTING BY ABSENT ELECTORS

Section 23-1301. Voting by elector when absent from place of residence or physically

incapacitated from going to polls.

23-1302(1). Application of absentee or physically incapacitated person for ballot 23-1302(2). Application of absentee or physically incapacitated person for ballot. Form of application.

23-1303.1. Forms and regulations for absentee voting in school district elections.

23-1304. Transmission of application to county clerk—delivery of ballot.

Duty of clerk to deliver application or ballot. 23-1305.

Mailing ballot to elector—form of return and affidavit. 23-1306.

23-1307.

Marking and swearing to ballot by elector.
Disposition of marked ballot upon receipt by elerk. 23-1308. 23-1309. Delivery or mailing of ballots to election judges. Clerk to keep record of ballots and issue certificate. 23-1310.

23-1311. Duty of election judges—pollbooks, numbering ballots and rejected ballots.

23-1312. Voting before election day by prospective absentee or physically incapacitated elector.

Envelopes containing ballots—deposit in box and rejection of ballot. Transmission of ballot by special delivery. 23-1313.

23-1314. 23-1315. Voting in person by elector on election day.

23-1316. Procedure when elector is present after marking absent or physically incapacitated voter ballot.

23-1317. Opening of envelopes after deposit.

23-1318. False swearing perjury-official misconduct a misdemeanor.

23-1319. Voting machines—canvass of votes.

Duty of elector if present on election day. 23-1320.

23-1321. Violation of law by elector or officer outside of state-change of venue.

23-1301. (715) Voting by elector when absent from place of residence or physically incapacitated from going to polls. Any qualified elector of this state, having complied with the laws in regard to registration, who is absent from the county or who is physically incapacitated from attending the precinct poll of which he is an elector on the day of holding any general or special election, or primary election for the nomination of candidates for such general election, or any municipal, school, general, special or primary election, may vote at any such election as hereinafter provided.

History: En. Sec. 1, Ch. 110, L. 1915; amd. Sec. 1, Ch. 155, L. 1917; re-en. Sec. 715, R. C. M. 1921; amd. Sec. 1, Ch. 234, L. 1943; amd. Sec. 1, Ch. 108, L. 1963.

Constitutionality

The Absent Voters Law (23-1301 to 23-1321) is a valid enactment and not open to the objection that in permitting a ballot to be delivered to the election officers by mail, it violates section 2, article IX of the state constitution, by providing that an elector shall have resided in the state one year immediately preceding the election "at which he offers to vote." The provision of the constitution does not require his personal presence at the polls. Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

Improper Delivery Voids Ballots

Absent voters' ballot delivered by coun-

ty clerk not to electors personally or by mail, but to one engaged in procuring electors to apply therefor and request that such ballots be delivered to such person, were void and could not be voted at ensuing election. State ex rel. Van Horn v. Lyon, 119 M 212, 173 P 2d 891, 895.

References

Maddox v. Board of State Canvassers, 116 M 217, 223, 149 P 2d 112.

Collateral References

Elections 213. 29 C.J.S. Elections § 210 (2).

29 C.J.S. Elections § 210 (2). 26 Am. Jur. 2d 70, Elections, § 243.

Right to vote of person inducted into military service under draft act. 129 ALR 1189.

Voting by persons in the military service. 149 ALR 1466; 151 ALR 1464; 152 ALR 1459; 153 ALR 1434; 154 ALR 1459 and 155 ALR 1459.

Validity of absentee voters' laws. 97 ALR 2d 218.

23-1302(1). (716) Application of absentee or physically incapacitated person for ballot. At any time within the period beginning forty-five (45) days next preceding such election and ending at 12 noon on the day next preceding the day of election, any elector expecting to be absent on the day of election from the county in which his voting precinct is situated, or any elector in United States service, or any elector who as a result of physical incapacity, in all probability will be unable to attend his voting precinct poll as made to appear by the certificate of a physician licensed under the laws of Montana, plainly stating the nature of the physical incapacity of the applicant, and certifying (a) that such incapacity will continue beyond the day of the election for which the application is made; (b) to the extent of reasonably preventing applicant from going to the polls, bodily health considered, may make application to the county clerk of such county, or to the city or town clerk, in the case of a municipal, general, or primary election, for an official ballot or official ballots to be voted at such election as an absent or physically incapacitated voter's ballot or ballots.

History: En. Sec. 2, Ch. 110, L. 1915; re-en. Sec. 2, Ch. 155, L. 1917; re-en. Sec. 716, R. C. M. 1921; amd. Sec. 2, Ch. 234, L. 1943; amd. Sec. 1, Ch. 104, L. 1953; amd. Sec. 3, Ch. 18, L. 1959; amd. Sec. 2, Ch. 124, L. 1963.

Compiler's Note

This section was amended twice by the 1959 legislature. Once by Ch. 18 and once

by Ch. 216. Chapter 18 was approved by the governor, February 6, 1959 while Chapter 216 was approved March 11, 1959. Neither amendment mentioned the other amendment and in some respects the section was amended differently by each chapter. The section above is as amended by Ch. 18. The section as amended by Ch. 216 is set out as section 23-1302(2).

23-1302(2). (716) Application of absentee or physically incapacitated person for ballot. At any time within forty-five (45) days next preceding such election, any voter expecting to be absent on the day of election from the county in which his voting precinct is situated, for any reason whatsoever, or who as a result of physical incapacity, in all probability will be unable to attend his voting precinct poll as made to appear by his affidavit, plainly stating the nature of the physical incapacity of the applicant, and stating (a) that such incapacity will continue beyond the day of the election for which the application is made; (b) to the extent of reasonably preventing applicant from going to the polls, bodily health considered, may make application to the county clerk of such county, or to the city or town clerk, in the case of a municipal, general, or primary election, for an

official ballot or official ballots to be voted at such election as an absent or physically incapacitated voter's ballot or ballots.

History: En. Sec. 2, Ch. 110, L. 1915; re-en. Sec. 2, Ch. 155, L. 1917; re-en. Sec. 716, R. C. M. 1921; amd. Sec. 2, Ch. 234, L. 1943; amd. Sec. 1, Ch. 104, L. 1953; amd. Sec. 1, Ch. 216, L. 1959.

Compiler's Note

This section was amended twice by the 1959 legislature. Once by Ch. 18 and once

by Ch. 216. Chapter 18 was approved by the governor, February 6, 1959 while Chapter 216 was approved March 11, 1959. Neither amendment mentioned the other amendment and in some respects the section was amended differently by each chapter. The section above is as amended by Ch. 216. The section as amended by Ch. 18 is set out as section 23-1302(1).

23-1303. (717) Form of application. Application for such ballots shall be made on a blank furnished by the county elerk of the county of which the applicant is an elector, or the city or town clerk, if it be municipal, general, special or primary election, and shall be in substantially the following form:

	Post-office	address	to	which	ballot	is	to	be	mailed
•									
St	ate of						••••		

own knowledge the matters and things therein stated are true.

This application must be subscribed by the applicant and sworn to before some officer authorized to administer oaths, pursuant to the laws of the place of execution, and the application shall not be deemed complete without this affidavit.

Provided that application for such ballot by any elector in the United States may be made by the federal post card application, or by any written request, signed by said applicant, addressed to the county clerk of the county of residence of said elector.

History: En. Sec. 3, Ch. 110, L. 1915; re-en. Sec. 3, Ch. 155, L. 1917; re-en. Sec. 717, R. C. M. 1921; amd. Sec. 1, Ch. 151, L. 1923; amd. Sec. 1, Ch. 32, L. 1941; amd.

Sec. 3, Ch. 234, L. 1943; amd. Sec. 2, Ch. 104, L. 1953; amd. Sec. 1, Ch. 152, L. 1955; amd. Sec. 4, Ch. 18, L. 1959; amd. Sec. 2, Ch. 216, L. 1959.

Compiler's Note

This section was amended twice by the 1959 legislature. Once by Ch. 18, Laws 1959 and once by Ch. 216, Laws 1959. Chapter 18 was approved by the governor, February 6, 1959 while Ch. 216 was approved March 11, 1959. Neither amendment mentioned the other act and as the acts amended the section in different re-

spects, the compiler has made a composite section, incorporating the changes made by each act.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110; State ex rel. Van Horn v. Lyon, 119 M 212, 173 P 2d 891, 892.

23-1303.1. Forms and regulations for absentee voting in school district elections. The state superintendent of public instruction shall prepare the form of application for absentee voter ballot for school districts and such other forms and regulations as may be necessary to carry out the purpose of this act, as it pertains to school districts.

History: En. Sec. 3, Ch. 108, L. 1963.

23-1304. (718) Transmission of application to county clerk—delivery of ballot. The voter making such application shall forward by mail or deliver in person the same to the county clerk of the county in which he is registered and it shall be the duty of the said county clerk to look up the applicant's registration card and compare the signature on the application for absent or physically incapacitated voter's ballot and the registration card and if convinced the person making the application for absent or physically incapacitated voter's ballot and the person who signed the original registration card is one and the same person, he shall accept the same in good faith and deliver the ballot as provided in section 23-1305.

History: En. Sec. 4, Ch. 110, L. 1915; amd. Sec. 4, Ch. 155, L. 1917; re-en. Sec. 718, R. C. M. 1921; amd. Sec. 2, Ch. 151, L. 1923; amd. Sec. 4, Ch. 234, L. 1943.

References

Goodell v. Judith Basin County, 70 M 222, 227, 236, 224 P 1110; State ex rel. Van Horn v. Lyon, 119 M 212, 173 P 2d 891, 892.

23-1305. (719) Duty of clerk to deliver application or ballot. Such application blank shall, upon request therefor, be sent by such county or city or town clerk to any elector of the county, by mail, and shall be delivered to any elector upon application made personally at the office of such county or city or town clerk; provided, however, that no elector shall be entitled to receive such a ballot on election day, nor unless his application is made to or received by the county or city or town clerk before the delivery of the official ballots to the judge of election.

History: En. Sec. 5, Ch. 110, L. 1915; re-en. Sec. 5, Ch. 155, L. 1917; re-en. Sec. 719, R. C. M. 1921.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

23-1306. (720) Mailing ballot to elector—form of return and affidavit. Upon receipt of such application, properly filled out and duly signed, or as soon thereafter as the official ballot for the precinct in which the applicant resides has been printed, the said county or city or town clerk shall send to such elector by mail, postage prepaid, one official ballot, or if there be more than one ballot to be voted by an elector of such precinct, one of each kind, and shall enclose with such ballot or ballots an envelope, to be furnished by such county or city or town clerk, which envelope shall bear upon the front thereof the name, official title and post-office address of

"State of

such county or city or town clerk, and upon the other side a printed affidavit, in substantially the following form:

· · · · · · · · · · · · · · · · · · ·	. SS.
County	
I,	, do solemnly swear that I am a resident
of the precinct,	(and if he be a resident of a city or town,
	, in the town or city of
"),	County of and State
of Montana, and entitled to vote	in such precinct at the next election; that
	aid county of my residence or, in all prob-
ability, to be physically incapac	citated from going to my precinct poll on
the day of holding such election	n and that I will have no opportunity to
vote in person on that day.	

Both the envelope in which the ballot is mailed to the elector in the United States service and the return envelope enclosed therein shall have printed across the face two parallel horizontal red bars, each one-quarter inch wide, extending from one side of the envelope to the other side, with an intervening space of one-quarter inch, the top bar to be one and one-quarter inches from the top of the envelope, and with the words "Official Election Balloting Material—via Air Mail," or similar language, between the bars; that there be printed in the upper right corner of each such envelope, in a box, the words "Free of U. S. Postage, Including Air Mail"; that all printing on the face of each such envelope be in red; and that there be printed in red in the upper left-hand corner of each state

sender.

The return envelope shall be self-addressed to the county or city or town clerk.

ballot envelope an appropriate inscription or blanks for return address of

The county or city or town clerk shall enclose with the ballot mailed to the elector in the United States service instructions for voting and returning the ballot.

History: En. Sec. 6, Ch. 110, L. 1915; and. Sec. 6, Ch. 155, L. 1917; re-en. Sec. Goodell v. Judith Basin County, 70 M 720, R. C. M. 1921; and. Sec. 5, Ch. 234, L. 1943; and. Sec. 5, Ch. 18, L. 1959.

23-1307. (721) Marking and swearing to ballot by elector. Such voter shall make and subscribe the said affidavit before an officer authorized by

law to administer oaths, pursuant to the laws of the place of execution and may do so at any place including any foreign country, before any officer authorized by the laws of the place of execution to take acknowledgments of instruments, and such voter shall thereupon, in the presence of such officer and of no other person, mark such ballot or ballots, but in such manner that such officer cannot see the vote, and such ballot or ballots thereupon, in the presence of such officer, shall be folded by such voter so that each ballot shall be separate, and so as to conceal the vote, and shall be, in the presence of such officer, placed in such envelope securely sealed. Said officer shall thereupon append his signature and official title at the end of said jurat and affidavit. Said envelope shall be mailed by such absent or physically incapacitated voter, postage prepaid, or delivered to the county or city or town clerk, as the case may be.

History: En. Sec. 7, Ch. 110, L. 1915; amd. Sec. 7, Ch. 155, L. 1917; re-en. Sec. 721, R. C. M. 1921; amd. Sec. 3, Ch. 151, L. 1923; amd. Sec. 6, Ch. 234, L. 1943; amd. Sec. 1, Ch. 60, L. 1953; amd. Sec. 3, Ch. 216, L. 1959.

References

Goodell v. Judith Basin County, 70 M 222, 237, 224 P 1110.

Collateral References
Elections 216.1.
29 C.J.S. Elections § 210.

23-1308. (722) Disposition of marked ballot upon receipt by clerk. Upon receipt of such envelope, such county or city or town clerk shall forthwith enclose the same, unopened, together with the written application of such absent voter or physically incapacitated voter in a larger envelope, which shall be securely sealed and endorsed with the name of the proper voting precinct, the name and official title of such clerk, and the words "This envelope contains an absent or physically incapacitated voter ballot, and must be opened only on election day at the polls when the same are open," and such clerk shall safely keep the same in his office until the same is delivered or mailed by him as provided in the next section.

History: En. Sec. 8, Ch. 110, L. 1915; re-en. Sec. 8, Ch. 155, L. 1917; re-en. Sec. 722, R. C. M. 1921; amd. Sec. 7, Ch. 234, L. 1943.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

23-1309. (723) Delivery or mailing of ballots to election judges. In case such envelope is received by such clerk prior to the delivery of the official ballots to a judge of election of the precinct in which such absent or physically incapacitated voter resides, said larger envelope, containing the said voter's envelope, and his said application as above provided, shall be delivered to the judge of election of such precinct, to whom the official ballots of the precinct shall be delivered, and at the same time. In case the official ballots for such precinct shall have been delivered to the judge of election prior to the time of the receipt by the said elerk of said absent or physically incapacitated voter's envelope, such clerk shall immediately after enclosing such voter's envelope and his application in a larger envelope, and after endorsing the latter as provided in the foregoing section, address and mail the larger envelope, postage prepaid, to the said judge of election of said precinct, as hereinafter further provided. If any absentee ballots are received by the clerk for which application was made after 12 noon on the day next preceding an election, the clerk shall endorse upon the voter's envelope the date and exact time of receipt and the words "To be rejected by authority of section 23-1309, R.C.M. 1947." Absentee ballots endorsed in this manner shall be delivered to the judge of election of said precinct and shall be rejected by the judge of election.

History: En. Sec. 9, Ch. 110, L. 1915; re-en. Sec. 9, Ch. 155, L. 1917; re-en. Sec. 723, R. C. M. 1921; amd. Sec. 8, Ch. 234, L. 1943; amd. Sec. 1, Ch. 124, L. 1963.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

23-1310. (724) Clerk to keep record of ballots and issue certificate. The ballot or ballots to be delivered or marked by such absent or physically incapacitated voter shall be one of the regular official ballots to be used at such election, and of each kind of such official ballots if there be more than one kind to be voted, beginning with ballot one and following consecutively, according to the number of applications for such absent or physically incapacitated voter ballots. The county or city or town clerk shall keep a record of all ballots so delivered for the purpose of absent voting, or voting by persons physically incapacitated from going to the polls, as well as of ballots, if any, marked before him as hereinafter provided, and shall make and deliver to the judge of election, to whom the ballots for the precinct are delivered, and at the time of the delivery of such ballots, a certificate stating the number of ballots delivered or mailed to absent or physically incapacitated voters, as well as those marked before him, if any, and the names of the voters to whom such ballots shall be delivered or mailed, or by whom they shall have been marked if marked before him.

History: En. Sec. 10, Ch. 110, L. 1915; re-en. Sec. 10, Ch. 155, L. 1917; re-en. Sec. 724, R. C. M. 1921; amd. Sec. 9, Ch. 234, L. 1943.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

23-1311. (725) Duty of election judges—pollbooks, numbering ballots and rejected ballots. The judges of election, at the opening of the polls, shall note on the pollbooks opposite the numbers corresponding to the numbers of the ballots issued to absent or physically incapacitated voters, as shown by the certificate of the county or city or town clerk, the fact that such ballots were issued to absent or physically incapacitated voters, and shall reserve said numbers for the absent or physically incapacitated voters. The notation may be made by writing the words "absent or physically incapacitated voters" opposite such numbers.

The judges shall not allow any names to be inserted in the pollbooks on the lines corresponding to said numbers, except the name of the elector entitled to each particular number according to the certificate of the county or city or town clerk, and the number of his ballot. Any so rejected shall be placed together with the voter's application and the absent or physically incapacitated voter's envelope provided for the purpose by the clerk and recorder or city or town clerk, which shall be sealed and endorsed by the words, "rejected absent or physically incapacitated voter ballots" numbered, and shall put thereon the number of the ballots given to absent or physically incapacitated voters according to the county or city or town clerk's certificate. There shall be a separate enclosing envelope for the ballot or ballots of each absent or physically incapacitated

voter whose ballot or ballots may have been rejected, and such envelopes shall be placed in an envelope together with the other ballots, and shall not be opened without order of a court of competent jurisdiction.

History: En. Sec. 11, Ch. 110, L. 1915; amd. Sec. 11, Ch. 155, L. 1917; re-en. Sec. 725, R. C. M. 1921; amd. Sec. 10, Ch. 234, L. 1943; amd. Sec. 9, Ch. 64, L. 1959.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

Collateral References
Elections 216.1.
29 C.J.S. Elections § 210.

23-1312. (726) Voting before election day by prospective absentee or physically incapacitated elector. Any qualified elector who is present in his county after the official ballots of such county or school district have been printed and who has reason to believe that he will be absent from such county or school district on election day, or physically incapacitated as provided in section 23-1302 may vote before he leaves his county or school district or prior to the inception of such physical incapacity, in like manner as an absent or physically incapacitated voter, before the county or city or town clerk or school district clerk, or some officer authorized to administer oaths and having an official seal; and the provisions of this act shall be deemed to apply to such voting. If the ballot be marked before the county or city or town or school district clerk it shall be his duty to deal with it in the same manner as if it had come by mail.

History: En. Sec. 12, Ch. 110, L. 1915; amd. Sec. 12, Ch. 155, L. 1917; re-en. Sec. 726, R. C. M. 1921; amd. Sec. 11, Ch. 234, L. 1943; amd. Sec. 2, Ch. 108, L. 1963. References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

23-1313. (727) Envelopes containing ballots—deposit in box and rejection of ballot. At any time between the opening and closing of the polls on such election day, the judges of election of such precinct shall first open the outer envelope only, and compare the signature of such voter to such application, with the signature to such affidavit.

In case the judge finds the affidavit is sufficient and that the signatures correspond, and that the applicant is then a duly qualified elector of such precinct, and has not voted at such election, they shall open the absent or physically incapacitated voter's envelope, in such manner as not to destroy the affidavit thereon, and take out the ballot or ballots therein contained, and without unfolding the same, or permitting the same to be opened or examined, shall ascertain whether the stub or stubs is or are still attached to the ballot or ballots, and whether the number thereon corresponds to the number in the county or city or town clerk's certificate. If so, they shall endorse the same in like manner that other ballots are endorsed, shall detach the stub as in other cases, and deposit the ballot or ballots in the proper ballot box or boxes, and make in their election records the proper entries to show such elector to have voted. In case such affidavit is found to be insufficient, or that the said signatures do not correspond, or that such applicant is not then a duly qualified elector of such precinct, such vote shall not be allowed, but, without opening the absent or physically incapacitated voter envelope, the judges of such election shall mark across the face thereof "rejected as defective" or "rejected as not an elector" as the case may be. The absent or physically incapacitated voter envelope, when such absent vote or vote by a person physically incapacitated from going to the polls is voted, and the absent or physically incapacitated voter envelope with its contents, unopened, when such absent vote or vote by a person physically incapacitated from going to the polls is rejected, shall be deposited in the ballot box containing the general or party ballots, as the case may be, retained and preserved in the manner by law provided for the retention and preservation of official ballots voted at such election. If, upon opening the absent or physically incapacitated voter's envelope, it be found that the stub of any ballot has been detached, or that the number thereon does not correspond to the number in the county or city or town clerk's certificate of the number issued to such absent or physically incapacitated voter, the ballot shall be rejected, and it shall then and there, and without looking at the face thereof, be marked on the back "rejected on the ground of" filling the blank with the statement of the reason of the rejection; which statement shall be dated and signed by the majority of the judges. The ballot or ballots so rejected, together with the absent or physically incapacitated voter's envelope bearing the application, and the said application, shall be all enclosed in an envelope, which shall be then and there securely sealed, and on such envelope the judges shall write or cause to be written (if not already printed thereon) the words, "rejected ballot of absent or physically incapacitated voter" (writing in the name of the elector). "The re-jected ballot or ballots is or are designate the rejected ballot as "general ballot," if it be a ballot for candidates that be rejected. If the rejected ballot be a one put on a question submitted to the vote of the electors, the judges shall designate such ballot as ballot question No. in the certificate on the envelope. There shall be a separate enclosing envelope for the ballot or ballots of each absent or physically incapacitated voter whose ballot or ballots may have been rejected and such enclosing envelope shall be placed in the envelope in which the other ballots voted or (are) required to be placed and shall not be opened without an order of a court of competent jurisdiction. The county or city or town clerk shall provide and have delivered to the judge of election suitable envelopes for enclosing rejected absent or physically incapacitated voter's ballots.

History: En. Sec. 13, Ch. 110, L. 1915; amd. Sec. 13, Ch. 155, L. 1917; re-en. Sec. 727, R. C. M. 1921; amd. Sec. 12, Ch. 234, L. 1943; amd. Sec. 10, Ch. 64, L. 1959.

Delivery of Ballot to Election Officials

Voting is accomplished not merely by marking the ballot, but by having it delivered to the election officials and deposited in the ballot box before the closing of the polls on election day, and this is equally true under the Absent Voter's

Law, (23-1301 to 23-1321) by virtue of this section. Maddox v. Board of State Canvassers, 116 M 217, 223, 149 P 2d 112.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

Collateral References

Elections©=216.1. 29 C.J.S. Elections § 210.

23-1314. (728) Transmission of ballot by special delivery. Whenever the county or city or town clerk shall mail the envelope containing an absent or physically incapacitated voter's envelope and ballots, as pro-

vided in this act, to a judge of election, he shall place thereon the proper postage and the proper stamp or stamps, and the proper markings to secure the transmission and delivery thereof as a special delivery letter, in accordance with the postal laws of the United States and the regulations of the United States post office.

History: En. Sec. 14, Ch. 110, L. 1915; amd. Sec. 14, Ch. 155, L. 1917; re-en. Sec. 728, R. C. M. 1921; amd. Sec. 13, Ch. 234, L. 1943.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

23-1315. (729) Voting in person by elector on election day. Any qualified elector who has marked his ballot as hereinbefore provided, who shall be in his precinct on election day, shall be permitted to vote in person, provided his said ballot has not already been deposited in the ballot box.

History: En. Sec. 15, Ch. 110, L. 1915; re-en. Sec. 15, Ch. 155, L. 1917; re-en. Sec. 729, R. C. M. 1921.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110; State ex rel. Mitchell v. District Court, 128 M 325, 275 P 2d 642, 651.

23-1316. (730) Procedure when elector is present after marking absent or physically incapacitated voter ballot. In case any elector who shall have marked his ballot as an absent or physically incapacitated voter, as in this act provided, shall appear at the voting place of his precinct on election day, before his ballot or ballots shall have been deposited in the ballot box, his envelope containing his ballot shall, if he so desires, be opened in his presence, and the ballot or ballots found therein shall be deposited in the ballot box as hereinbefore provided. If such elector shall ask for a new ballot or ballots with which to vote, he shall be entitled to the same, but in such case his absent or physically incapacitated voter envelope shall not be opened, and the judges shall mark, or cause to be marked, across the face thereof, "unopened because voter appeared and voted in person," and then deposit the said envelope, unopened, in the ballot box. If the envelope containing the absent or physically incapacitated voter ballot shall have been marked "rejected as defective," and deposited in the ballot box, such elector so appearing shall have the same right to vote as if he had not attempted to vote as an absent or physically incapacitated voter. If voting machines are there used, he shall vote by machine as other voters.

History: En. Sec. 16, Ch. 110, L. 1915; re-en. Sec. 16, Ch. 155, L. 1917; re-en. Sec. 730, R. C. M. 1921; amd. Sec. 14, Ch. 234, L. 1943.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110; State ex rel. Mitchell v. District Court, 128 M 325, 275 P 2d 642, 651.

23-1317. (731) Opening of envelopes after deposit. If the aforesaid envelope containing an absent or physically incapacitated voter ballot shall have been deposited, unopened, in the ballot box, the said envelope shall not be opened, without an order of a court of competent jurisdiction.

History: En. Sec. 17, Ch. 110, L. 1915; re-en. Sec. 17, Ch. 155, L. 1917; re-en. Sec. 731, R. C. M. 1921; amd. Sec. 15, Ch. 234, L. 1943,

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110. 23-1318. (732) False swearing perjury—official misconduct a misdemeanor. If any person shall willfully swear falsely to any affidavit in this act provided for, he shall, upon conviction thereof, be deemed guilty of perjury, and shall be punished as in such cases by law provided. If the county or city or town clerk, or any election officer, shall refuse or neglect to perform any of these duties prescribed by this act, or shall violate any of the provisions thereof, or if any officer taking the affidavit provided for in section 23-1306 shall make any false statement in his certificate thereto attached, or look at any mark or marks made by the voter upon any such ballot, or permit or allow any other person to be present at the marking of any such ballot by the voter, or to see any mark or marks made thereon by the voter, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

History: En. Sec. 18, Ch. 110, L. 1915; amd. Sec. 18, Ch. 155, L. 1917; re-en. Sec. 732, R. C. M. 1921.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

Collateral References

Elections 314; Perjury 8.
29 C.J.S. Elections § 327; 70 C.J.S. Perjury § 23.

23-1319. (733) Voting machines—canvass of votes. In and for precincts where voting machines are to be used, the county or city or town clerk shall cause to be printed and shall provide ballots in the regular form of printed ballots, and sufficient printed ballots and sufficient in number for possible absent or physically incapacitated voters, and also pollbooks and ballot boxes such as lists required for the precincts in which printed ballots are used. Absent or physically incapacitated voters' ballots received in such precincts shall be cast as in this act provided, and all provisions of this act and of the election laws shall apply to the casting, canvassing, counting and returning of such ballots and votes, except as herein otherwise provided. In making the canvass, the votes cast by absent or physically incapacitated voters shall be added by the judges of election to the votes cast on the voting machines, and the results determined and reported accordingly.

History: En. Sec. 19, Ch. 110, L. 1915; amd. Sec. 19, Ch. 155, L. 1917; re-en. Sec. 733, R. C. M. 1921; amd. Sec. 16, Ch. 234, L. 1943.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

Collateral References

Elections ≈ 222. 29 C.J.S. Elections § 203.

23-1320. (734) Duty of elector if present on election day. In case any elector who shall have taken advantage of the provisions of this act, and marked his ballot as an absent or physically incapacitated voter, as in this act provided, shall not leave his county, or shall return thereto or shall have recovered physical capacity to go to the polls on or before election day, and in time to allow him to go to the polls, to wit, to the voting place in his precinct, and to be admitted therein before the close of the polls, it shall be his duty so to go to the said voting place and to present himself

to the judges of election at said voting place, and if he shall willfully neglect so to do he shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one hundred (\$100.00) dollars or by imprisonment not more than thirty (30) days in the county jail or by both such fine and imprisonment. If such an elector so appears the judges of election shall note in the precinct register the fact of his appearance as well as whether or not he voted in person.

History: En. Sec. 20, Ch. 110, L. 1915; re-en. Sec. 20, Ch. 155, L. 1917; re-en. Sec. 734, R. C. M. 1921; amd. Sec. 17, Ch. 234, L. 1943; amd. Sec. 11, Ch. 64, L. 1959.

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

Collateral References

Elections 313. 29 C.J.S. Elections § 325.

23-1321. (735) Violation of law by elector or officer outside of state change of venue. If any elector of this state or any other person or any officer shall, in any matter connected with voting outside of the state under the provisions of this law, in any manner violate any of the provisions of this act, or of any of the election or penal laws of this state applicable to voting under this act, in such manner that such violation would constitute an offense if committed within the state, then and in such case such elector, person, or officer shall be deemed guilty of a like offense, and be punishable to the same extent and in the same manner as if the act, omission, or violation had been committed in this state, and may be prosecuted in any county in this state; provided, however, that if the defendant or one of several defendants be a resident of the state he may have the case removed to the county in which the ballot was cast, or was to be cast, if not, in fact cast; and provided, further, that the court may order any such case removed to such county, subject always to the power of the court of any county to grant a change of venue as in other cases.

History: En. Sec. 21, Ch. 155, L. 1917; re-en. Sec. 735, R. C. M. 1921.

Collateral References

Elections 313, 314. 29 C.J.S. Elections §§ 325, 327.

References

Goodell v. Judith Basin County, 70 M 222, 227, 224 P 1110.

CHAPTER 14

VOTING BY ABSENT ELECTORS IN UNITED STATES SERVICE

Registration of absent electors in United States service. Section 23-1401.

23-1402. Definition of electors in United States service.

23-1403.

The federal post card application. Oath for elector in the United States service. 23-1404.

Classification of federal post card application.

Penalty applicable. 23-1406.

23-1401. Registration of absent electors in United States service. Any elector of this state in the United States service who is absent from the state of Montana and the county of which he or she is a resident shall be entitled to register by mailing to the county clerk a federal post card application filled out and signed under oath, which shall be the "OFFICIAL WAR REGISTRATION CARD" of the state.

History: En. Sec. 1, Ch. 99, L. 1943; amd. Sec. 6. Ch. 18, L. 1959.

Collateral References Elections 216.1. 29 C.J.S. Elections \$ 210.

- 23-1402. Definition of electors in United States service. The phrase "elector in United States service" as used in the Revised Codes of Montana of 1947, as amended, shall include the following:
- (1) Members of the armed forces while in the active service, and their spouses and dependents.

Members of the merchant marine of the United States, and their

spouses and dependents.

- (3) Civilian employees of the United States in all categories serving outside the territorial limits of the several states of the United States and the District of Columbia and their spouses and dependents when residing with or accompanying them, whether or not the employee is subject to the civil service laws and the Classification Act of 1949, and whether or not paid from funds appropriated by the Congress.
- (4) Members of religious groups or welfare agencies assisting members of the armed forces, who are officially attached to and serving with the armed forces, and their spouses and dependents.

History: En. Sec. 2, Ch. 99, L. 1943; amd. Sec. 7, Ch. 18, L. 1959.

- 23-1403. The federal post card application. The form of the federal post card application, which may be used both as an application for registration and for a ballot, shall be as follows:
- The cards shall be approximately nine and one-half (9½) by four and one-eighth $(4\frac{1}{8})$ inches in size.
- (h) Unon one side perpendicular to the long dimension of the

here shall be printed in black type the following:
FILL OUT BOTH SIDES OF CARD POST CARD APPLICATION FOR ABSENTEE BALLOT
tate or Commonwealth of(Fill in name of State or Commonwealth)
(1) I hereby request an absentee ballot to vote in the coming election: (GENERAL) (PRIMARY)* (SPECIAL) ELECTION (Strike out inapplicable words)
(2) *If a ballot is requested for a primary election, print your political earty affiliation or preference in this box: (If primary election is secret in your state, do not answer).
(3) I am a citizen of the United States, eligible to vote in above state, and am:
 a. A member of the armed forces of the United States b. A member of the merchant marine of the United States c. A member of a religious or welfare organization assisting servicemen d. A civilian employed by the United States government outside the United States (continental)
934

(11) Subscribed and sworn to before me on

(Day, month and year)

(Signature of official administering oath) (Typed or printed name of official administering oath.)

(Title or rank, service number and organization of administering official)

INSTRUCTIONS

A. Before filling out this form see your voting officer in regard to the voting laws of your state and absentee registration and voting procedure.

Type or print all entries except signatures. FILL OUT BOTH SIDES OF CARD.

- C. Address card to proper state official. Your voting officer or commanding officer will furnish you with his title and address.
- D. Mail card as soon as your state will accept your application.
- E. No postage is required for the card.
- (c) Upon the other side of the card there shall be printed in red type the following:

	FILL OU	T BOTH SIDES	S OF THE CARD		
***************************************	••••••••	(Name)		•••••••	
FREE OF U. S. POSTAG Including Air Mail					
(Unit, Gov't A	gency, or Of	,			
(Mil. Base, Sta	tion, Ship or		•••••••••••••••••••••••••••••••••••••••		• • • • • • • • • • • • • • • • • • • •
(Street No., Al	PO, or FPO	No.)	•••••••••••••••••••••••••••••••••••••••	•••••••	•
(City, Postal Z	ione, State)			• • • • • • • • • • • • • • • • • • • •	
OFFICIAL E	LECTION	BALLOTING To:	MATERIAL—VIA	AIR	MAIL
			(Title of election	official	1)
		******	(County or towns	ship)	
		••••	(City or Town,	State)	***********

History: En. Sec. 3, Ch. 99, L. 1943; amd. Sec. 8, Ch. 18, L. 1959.

23-1404. Oath for elector in the United States service. Any oath required for electors in the United States service to register, request a ballot or vote may be administered and attested, within or without the United States, by any commissioned officer in the active service of the armed forces, or any member of the merchant marine of the United States designated for this purpose by the secretary of commerce, or any civilian official empowered by state or federal law to administer oaths. No official seal need be affixed to said oath and neither the elector nor the certifying officer need disclose his whereabouts at the time of taking said oath except to the extent required by the federal post card application.

History: En. Sec. 4, Ch. 99, L. 1943; amd. Sec. 9, Ch. 18, L. 1959.

23-1405. Classification of federal post card application. Upon receipt by the county clerk of a federal post card application properly filled out and signed under oath, the county clerk shall classify such federal post card application according to the precinct in which the elector resides, and shall arrange the cards in each precinct in alphabetical order. The county clerk shall, upon receipt of any federal post card application, immediately

enter upon the official register of the county in the proper precinct the full information given by said elector. Immediately upon entry upon the official register of the county of the name of the elector in the United States service the county clerk shall send to him or her by the fastest mail service available a notice that he has been registered and informing him that in order to secure a ballot he must mail at any time within forty-five (45) days next preceding the election another federal post card application to his county clerk or city clerk or town clerk.

History: En. Sec. 5, Ch. 99, L. 1943; amd. Sec. 10, Ch. 18, L. 1959.

23-1406. Penalty applicable. The penalty provided for by section 23-503, in the case of an elector residing within the county who registers, is hereby made applicable to violations of the provisions of this act.

History: En. Sec. 6, Ch. 99, L. 1943.

CHAPTER 15

REGISTRATION OF ELECTORS ABSENT FROM COUNTY OF THEIR RESIDENCE

Section 23-1501. Method of registration of voters absent from county.

23-1502. Registration card mailed upon application. 23-1503. Questions asked and answered in writing.

23-1501. Method of registration of voters absent from county. Any elector who is unable to make personal application for registration to vote by appearing before the county clerk and ex officio registrar of the county of his or her legal residence, by reason of being absent from the county, may register to vote prior to the close of registration, before any election to be held in the state of Montana, by appearing, executing and verifying under oath, before a notary public or other officer authorized to administer oaths, at any place within the continental limits of the United States of America, a registration card in the form prescribed in section 23-502, and returning such registration card, so executed and verified, to the county clerk and ex officio registrar of the county in which his or her legal residence is located in sufficient time to reach such county clerk and ex officio registrar before the close of registration; provided, however, such an elector shall not be entitled to have his name entered in the official register of electors until at least two (2) registered electors of the county in which such elector desiring to be registered has his place of residence, as stated in his application for registration, appear before the county clerk and ex officio registrar and make affidavit or affidavits in writing, stating they are personally acquainted with the applicant for registration, are familiar with and know his signature, have seen him write and that the signature subscribed to the application for registration is the signature of such elector.

History: En. Sec. 1, Ch. 190, L. 1943. Collateral References Elections 216.1.

Elections 216.1. 29 C.J.S. Elections § 210.

23-1502. Registration card mailed upon application. The county clerk and ex officio registrar of the county of an elector's legal residence shall furnish to any elector applying therefor, whether application be made by

mail, telegram or telephone, one (1) of the printed registration cards provided for registration of electors, to be used by such elector in registering; said card to be transmitted by United States mail, with postage prepaid, by said county clerk and ex officio registrar to the address furnished by the elector at the time of making of his application.

History: En. Sec. 2, Ch. 190, L. 1943.

23-1503. Questions asked and answered in writing. In the case of any person who desires and who is entitled to register in the manner provided in section 23-1501, the questions required by section 23-510, to be asked each person registering, shall be propounded in writing and shall be transmitted by the county clerk and ex officio registrar, together with registration card, in the manner above provided, to the person so desiring to register, who shall answer such questions in writing and shall return such answers to the county clerk and ex officio registrar, together with completed registration card.

History: En. Sec. 3, Ch. 190, L. 1943.

CHAPTER 16

VOTING MACHINES-CONDUCT OF ELECTION WHEN USED

Section 23-1601. Voting machines—secretary of state. 23-1602. Specifications of machines required.

23-1603. Purchase and use of voting machines at elections.

23-1604. Payment for machines, how provided for. 23-1605. Method of conducting elections.

23-1606. Assistance to elector unable to record vote.

23-1607. Ballots and instructions to voters.

23-1608. City and county clerks to set up machines for use.

23-1608A. Ballot—arrangement on machine. 23-1609. Irregular ballots. 23-1610. Counting the votes.

23-1611. Election returns.

23-1612. Election laws applicable.
23-1613. Penalty for neglect of duty by election officer.
23-1614. Penalty for tampering with or injuring machines.
23-1615. Penalty for violation of duty by judge of election. 23-1616. Penalty for fraudulent returns or certificates.

23-1617. Experimental use of machines—defective machines.

23-1618. Approved machines—continuation of use.

23-1601. (757) Voting machines—secretary of state. It shall be the duty of the secretary of state to examine, or cause to be examined, all voting or ballot machines in order to determine whether such machines comply with the requirements of this chapter, and can safely be used by voters at elections under the provisions of said chapter, and no machine or machines shall be provided or used at any election in this state unless such machine or machines shall have received the approval of the secretary of state as herein provided. The secretary of state may employ two qualified mechanics, who shall be qualified electors of the state of Montana, to examine said machines and assist him in the discharge of his duties under said chapter, the compensation to be paid such qualified mechanics not to exceed the sum of ten dollars (\$10.00) each for each day actually employed. Any machine or machines which shall have the approval of the secretary of state may be provided for in this chapter. The report of the secretary of state on each and every kind of voting machine shall be filed in his office

within thirty days after examining the machine, and he shall, within five days after the filing of any report approving any machine or machines transmit to the board of county commissioners, city or town council or other board of officers having charge and control of elections in each of the counties, cities and towns in this state, a list of the machines so approved. No machine or machines shall be used unless they shall have received the approval of the secretary of state at least sixty days prior to any election at which such machine or machines are to be used. The compensation of the mechanics and all other expenses connected with the examination of any machine shall be paid, or cause to be paid, by the person or company submitting a machine for examination before the filing of the report thereon. The amount of such expenses shall be certified by the state auditor and paid by the state treasurer.

History: En. Sec. 1, Ch. 168, L. 1907; Sec. 609, Rev. C. 1907; re-en. Sec. 757, R. C. M. 1921; amd. Sec. 1, Ch. 19, L. 1943.

Constitutionality

Chapter 168, Laws 1907 (23-1601 et seq.) is not invalid as in contravention of section 1, article IX of the constitution of Montana, providing that all elections shall be "by ballot," the term "ballot" being em-

ployed not to designate a piece of paper, but a method to ensure, so far as possible, the secrecy and integrity of the popular vote. State ex rel. Fenner v. Keating, 53 M 371, 377, 163 P 1156.

Collateral References

Elections \$222. 29 C.J.S. Elections \$203. 26 Am. Jur. 2d 80, Elections, \$253.

23-1602. (758) Specifications of machines required. No machine or machine system shall be approved by the secretary of state unless it is so constructed as to afford every elector a reasonable opportunity to vote for any person for any office, or for or against any proposition for whom, or for or against which he is entitled by law to vote, and enable him to do this in secrecy; and it must be so constructed as to preclude an elector from voting for any candidate for the same office or upon any question more than once, and from voting for any person for any office or on any proposition, for whom or on which he is not entitled to vote. The machine or machine system must admit of his voting a split ticket as he may desire. It must also be constructed as to register or record each and every vote cast. For presidential electors one device may be provided for voting for all the candidates on one party at one time by the use of such device, opposite or adjacent to which shall be a ballot on the machine containing the names of all the candidates for all presidential electors for that party, and a vote registered or recorded by the use of such device shall be counted for each of such candidates on said ballot. The machine must be so constructed that it cannot be tampered with or manipulated for any fraudulent purpose; and the machine must be so locked, arranged, or constructed, that during the progress of the voting no person can see or know the number of votes registered or recorded for any candidate or for or against any proposition.

History: En. Sec. 2, Ch. 168, L. 1907; Sec. 610, Rev. C. 1907; re-en. Sec. 758, R. C. M. 1921; amd. Sec. 2, Ch. 19, L. 1943.

Type of Machine Required

In an action of quo warranto to deter-

mine the title to an office, the claim was made that the voting machines used at an election in one of the counties of the state did not comply with the law which authorizes their use, basing the contention upon the provision of above section, that "the machine must be constructed so that it cannot be tampered with or manipulated for any fraudulent purpose." The provision quoted is, however, to be read in connection with the remainder of the act and, when so read, it becomes obvious that the act does not require a voting machine which will be proof against all tampering or manipulation, but one which, when honestly operated, will enable an elector to secretly east his vote as he wishes to cast it and have it counted as cast, and which cannot be tampered with or manipulated in such a way that, though properly operated by the elector, it would seem to receive and record his vote without doing so. State ex rel. Fenner v. Keating, 53 M 371, 381, 163 P 1156.

Collateral References
Elections \$27.
29 C.J.S. Elections § 191.

23-1603. (759) Purchase and use of voting machines at elections. The boards of county commissioners of counties of the first class shall, and the boards of county commissioners of other counties and city councils of all cities and towns, may, at their option, adopt and purchase, for use in the various precincts, any voting machine approved in the manner above set forth in section 23-1601, by the secretary of state, and none other. If it shall be impracticable to supply each and every election district with a voting machine or voting machines at any election following the adoption of such machines in a city, village, or town, as many may be supplied as it is practicable to procure, and the same shall be used in such precinct of the municipality, as the proper officers may order. The proper officers of any city, village, or town may, not later than the tenth (10th) day of September, in any year in which a general election is held, unite two or more precincts into one for the purpose of using therein at such election a voting machine, and the notice of such uniting shall be given in the manner prescribed by law for the change of election districts.

History: En. Sec. 3, Ch. 168, L. 1907; Sec. 611, Rev. C. 1907; amd. Sec. 1, Ch. 6, L. 1909; re-en. Sec. 759, R. C. M. 1921; amd. Sec. 1, Ch. 26, L. 1947. Collateral References
Elections 222.
29 C.J.S. Elections § 203.
26 Am. Jur. 2d 80, Elections, § 253.

23-1604. (760) Payment for machines, how provided for. Payment for voting machines purchased may be provided by the issuance of interest-bearing bonds, certificates of indebtedness, or other obligation, which will be a charge upon such county, city, or town. Such bonds, certificates, or other obligation may be made payable at such time or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold at less than par.

History: En. Sec. 4, Ch. 168, L. 1907; Sec. 612, Rev. C. 1907; re-en. Sec. 760, R. C. M. 1921.

Collateral References

Counties = 164, 173 (1); Municipal Corporations = 897, 910.
20 C.J.S. Counties §§ 248, 258; 64 C.J.S. Municipal Corporations §§ 1893, 1905.

23-1605. (761) Method of conducting elections. (1) The room in which the election is held shall have a railing separating that part of the room to be occupied by the election officers from that part of the room occupied by the voting machine. The exterior of the voting machine and every part of the polling place shall be in plain view of the judges. The machine shall be so placed that no person on the opposite side of the railing can see or determine how the voter casts his vote, and that no person can so see or determine from the outside of the room. After the opening of the

polls, the judges shall not allow any person to pass within the railing to that part of the room where the machine is situated, except for the purpose of voting and except as provided in the next succeeding section of this act; and they shall not permit more than one voter at a time to be in such part of the room. They shall not themselves remain or permit any person to remain in any position that would permit him or them to see or ascertain how the voter votes or how he has voted. No voter shall remain within the voting machine booth or compartment longer than one minute, and if he should refuse to leave it after that lapse of time he shall at once be removed by the judges. The election board of each election precinct in which a voting machine is used shall consist of three judges of election. Where more than one machine is to be used in an election precinct, one additional judge shall be appointed for each additional machine. Before each election at which voting machines are to be used, the custodian shall instruct all judges of election that are to serve thereat in the use of the machine and their duties in connection therewith; and he shall give to each judge that has received such instruction, and is fully qualified to conduct the election with the machine, a certificate to that effect. For the purpose of giving such instruction, the custodian shall call such meeting or meetings of the judges of election as shall be necessary.

(2) Each judge of election shall attend such meeting or meetings and receive such instructions as shall be necessary for the proper conduct of the election with the machine; and, as compensation for the time spent in receiving such instruction, each judge that shall qualify for and serve in the election shall receive the sum of one dollar, to be paid to him at the same time and in the same manner as compensation is paid to him for his services on election day. No such judge of election shall serve in any election at which a voting machine is used, unless he shall have received such instruction and is fully qualified to perform his duties in connection with the machine, and has received a certificate to that effect from the custodian of the machines; provided, however, that this shall not prevent the appointment of a judge of election to fill a vacancy in an emergency.

History: En. Sec. 5, Ch. 168, L. 1907; Sec. 613, Rev. C. 1907; amd. Sec. 1, Ch. 99, L. 1909; re-en. Sec. 761, R. C. M. 1921. Collateral References
Elections 222.
29 C.J.S. Elections \$ 203.

23-1606. (762) Assistance to elector unable to record vote. If any voter shall, in the presence of the judges of election, declare that he is unable to read or write the English language, or that by reason of a physical disability or total blindness he is unable to register or record his vote upon the voting machine, he shall be assisted as provided by section 23-1213. Any person who shall deceive any elector in registering or recording his vote under this section, or who shall register or record his vote in any other way than as requested by such person or who shall give information to any person as to what ticket or for what person or persons such person voted, shall be punished as provided in section 94-1407.

History: En. Sec. 6, Ch. 168, L. 1907; Sec. 614, Rev. C. 1907; re-en. Sec. 762, R. C. M. 1921; amd. Sec. 1, Ch. 31, L. 1935. Collateral References
Elections \$\iiins 220.
29 C.J.S. Elections \\$ 208.
26 Am. Jur. 2d 68, Elections, \\$ 238.

23-1607 ELECTIONS

- (763) Ballots and instructions to voters. (1) Not more than 23-1607. ten (10) or less than three (3) days before each election at which voting machines are to be used, the board, or officials, charged with the duty of providing ballots, shall publish in newspapers representing at least two (2) political parties a diagram of reduced size showing the face of the voting machine, after the official ballot labels are arranged thereon, together with illustrated instructions how to vote, and a statement of the locations of such voting machines as shall be on public exhibition; a voting machine shall at all time be on exhibition for public demonstration in the office of the county clerk and recorder in the counties where said voting machines are used, and it shall be the duty of said county clerk and recorder to demonstrate and explain the working and operation of said voting machine to any inquiring voter; or in lieu of such publication, said board or officials may send by mail or otherwise at least three (3) days before the election, a printed copy of said reduced diagram to each registered voter.
- (2) Not later than forty (40) days before each election at which voting machines are to be used the secretary of state shall prepare samples of the printed matter and supplies named in this section, and shall furnish one of each thereof to the board or officials having charge of election in each county, city, or village in which the machines are to be used, such samples to meet the requirements of the election to be held, and to suit the construction of the machine to be used.
- (3) The board or officials charged with the duty of providing ballots, shall provide for each voting machine for each election the following printed matter and supplies; suitable printed or written directions to the custodian for testing and preparing the voting machines for the election: one certificate on which the custodian can certify that he has properly tested and prepared the voting machine for the election; one certificate on which some person other than the custodian preparing the machine, can certify that the voting machine has been examined and found to have been properly prepared for the election; one certificate on which the party representatives can verify that they have witnessed the testing and preparation of the machines; one certificate on which the deliverer of the machine can certify that he has delivered the machines to the polling places in good order; one card stating the penalty for tampering with or injuring a voting machine; two seals for sealing the voting machine; one envelope in which the keys to the voting machine can be sealed and delivered to the election officers, said envelope to have printed or written thereon the designation and location of the election district in which the machine is to be used, the number of machine, the number shown on the protective counter thereof after the machine has been prepared for the election and the number or other designation on such seal as the machine is sealed with; said envelope to have attached to it a detachable receipt for the delivery of the keys of the voting machine to the judge of election; one envelope in which keys to the voting machine can be returned by the election officers after the election; one card stating the name and telephone address of the custodian on the day of the election; two statements of canvass on which the election officers can report the canvass of votes as shown on the voting machine, together with other necessary information relating to

the election, said statements of canvass to take the place of all tally papers, statements, and returns as provided heretofore; three (3) complete sets of ballot labels; two diagrams of the face of the machine with the ballot labels thereon, each diagram to have printed above it the proper instructions to voters for voting on the machine; six (6) suitable printed instructions to judges of election; six (6) notices to judges of election to attend the instruction meeting; six (6) certificates that the judges of election have attended the instruction meeting, have received the necessary instruction, and are qualified to conduct the election with the machine.

- (4) The ballot labels shall be printed in black ink on clear white material of such size and arrangement as shall suit the construction of the machine; provided, however, that the ballot labels for the questions may contain a condensed statement of each question to be voted on, followed by the words "Yes" and "No"; and provided further, that the titles of the officers thereon shall be printed in type as large as the space for each office will reasonably permit, and wherever more than one candidate will be voted for for an office, there shall be printed below the office title thereof the words "vote for any two," or such number as the voter is lawfully entitled to vote for for such office.
- (5) When any person is nominated for an office by more than one political party his name shall be placed upon the ticket under the designation of the party which first nominated him; or, if nominated by more than one party at the same time, he shall, within the time fixed by law for filing certificates of nomination, file with the officer with whom his certificate of nomination is required to be filed, a written statement indicating the party designation under which he desires his name to appear upon the ballot, and it shall be so printed. If he shall refuse or neglect to so file such a statement, the officer with whom the certificate of nomination is required to be filed shall place his name under the designation of either of the parties nominating him, but under no other designation whatsoever.
- (6) If the election be one at which all the candidates for office of presidential electors are to be voted for with one device, the county commissioners shall furnish for each machine twenty-five (25) ballots for each political party, each ballot containing the names of the candidates for the office of presidential electors of such party and a suitable space for writing in names, so that the voter can vote thereon for part of the candidates for the office of presidential electors of one party and part of the candidates therefor of one or more other parties or for persons for that office not nominated by any party. For election precincts in which voting machines are to be used, no books or blanks for making poll lists shall be provided, but in lieu thereof, the registry lists shall contain a column in which can be entered the number of each voter's ballot as indicated by the number registered on the public counter as he emerges from the voting machine.

History: En. Sec. 7, Ch. 168, L. 1907; Sec. 615, Rev. C. 1907; amd. Sec. 2, Ch. 99, L. 1909; amd. Sec. 1, Ch. 246, L. 1921; re-en. Sec. 763, R. C. M. 1921.

Collateral References
Elections = 222.

29 C.J.S. Elections § 203.

23-1608. (764) City and county clerks to set up machines for use.
(1) The city or county clerks of each city or county in which a voting

machine is to be used shall cause the proper ballots to be put upon each machine corresponding with the sample ballots herein provided for, and the machines in every way put in order, set and adjusted ready for use in voting when delivered at the precinct, and for the purpose of so labeling the machines, putting in order, setting and adjusting the same, they may employ one or more competent persons, and they shall cause the machine so labeled, in order and set and adjusted, to be delivered at the voting precinct, together with all necessary furniture and appliances that go with the same in the room where the election is to be held in the precinct, in time for the opening of the polls on election day; provided, however, that a shield of tin painted black made to conform with the shape of the keys or levers on said voting machine, shall be placed over the keys or levers not in use on the face of the ballot of the voting machine; said shields to be plainly marked with the words "not in use."

- (2) In primary elections a separate row or column shall be assigned to each political party and at least one row or column shall separate the rows assigned to the two major political parties as defined in section 23-1107. In this row or column shall be placed the nonpartisan judicial ballot. In general elections the ballot on the voting machines shall be arranged and the names of the candidates for each office rotated to conform as nearly as possible to the requirements for paper ballots set forth in section 23-1107. The names of the candidates of the two major parties as defined in section 23-1107 shall appear in and be rotated between the first two horizontal rows or vertical columns, and the names of the candidates of minor parties and independent candidates shall appear in and be rotated between succeeding rows or columns; provided, however, that the arrangement of the ballot shall be uniform on all machines in the same precinct. The party designation of each candidate shall be printed after or below his name in type as large as the design of the machine will allow.
- (3) The nonpartisan judicial ballot shall be placed in the first two horizontal or vertical rows or columns in the same position as prescribed for judicial candidates in section 23-1111.
- (4) The judges shall compare the ballots on the machine with the sample ballot, see that they are correct, examine and see that all the counters, if any, in the machine are set at zero, and that the machine is otherwise in perfect order, and they shall not thereafter permit the machine to be operated or moved except by electors in voting, and they shall also see that all necessary arrangements and adjustments are made for voting irregular ballots on the machine, if such machine be so arranged.

History: En. Sec. 8, Ch. 168, L. 1907; 246, L. 1921; re-en. Sec. 764, R. C. M. Sec. 616, Rev. C. 1907; amd. Sec. 2, Ch. 1921; amd. Sec. 1, Ch. 20, L. 1959.

23-1608A. Ballot—arrangement on machine. The arrangement of the general election ballot on voting machines with horizontal rows shall be, as nearly as possible, in the following form:

FOR AGAINST		(Same for all County and Town- ship offices)					
INITIATIVE NO. 1	COUNTY COMMIS- SIONER Vote for one	JOHN DOE Democrat	MIKE ROE Republican				
	MEMBER OF THE HOUSE OF REPRESENTATIVES Vote for four	FRANK HOE Democrat	EARL ROE Republican				
		BILL DOE Republican	JOHN MOE Democrat	BILL LOE Prohibition			
		PETE COE Democrat	OLE KOE Republican	JIM GOE Socialist			
		JACK BOE Democrat	ALLEN JOE Republican	MIKE FOE Independent			
FOR AGAINST	STATE SENATOR Vote for one	JOE COE Republican	TOM DOE Democrat				
CONSTITUTIONAL AMENDMENT F	(Same for Licutenant Governor, Secretary Governor, Secretary General, State Treasurer, State Anditor, Railroad and Public Service Commission-er, State Superin-er, State Superin-er, State Superin-er, State Superin-er, State Superin-Court, Associate Justice of the Supreme Court, Associate Justice of the District Judges)						
	GOVERNOR Vote for one	BILL COE Republican	TOM ROE Democrat				
	REPRESENT- ATIVE IN CONGRESS Vote for one	JOHN DOE Democrat	MIKE ORE Republican				
	UNITED STATES SENATOR Vote for one	TOM COE Republican	JACK MOE Democrat	JOE ROE Socialist			
	PRESIDENTAL ELECTORS TO VOTE FOR PRESIDENT AND VICE-PRESI- DENT OF THE UNITED STATES Vote for one	Democrat JOHN DOE for President ALBERT ORE for Vice-President John Doe, Ella Moe, Jane Roe, Tom Voe	Republican FRANK MOE for President HARNY COE for Vice-President Jane Doe, John Moe, Tom Roe, John Voe				
INITIATIVES, REFERENDUMS AND CONSTITUTIONAL AMENDMENTS	OFFICES	CANDIDATES	CANDIDATES	CANDIDATES	CANDIDATES		

The arrangement of the general election ballot on voting machines with vertical columns shall be, as nearly as possible, in the following form:

Offices	Candidates	Candidates	Candidates	Candidates	Initiatives, Referendums and Constitutional Amendments	
FOR PRESIDENTIAL ELECTORS TO VOTE FOR PRESIDENT AND VICE-PRESIDENT OF THE UNITED STATES Vote for one	Democrat JOHN DOE for President ALBERT ORE for Vice-President John Doe, Ella Moe Jane Roe, Tom Voe	Republican FRANK MOE for President HARRY COE for Vice-President Jane Doe, John Moe Tom Roe, John Voe				CONSTITU- TIONAL AMENDMEN
UNITED STATES SENATOR Vote for one	TOM COE Republican	JACK MOE Democrat	JOE HOE Socialist	:	FOR	
REPRESENTA- TIVE IN CONGRESS Vote for one	JOE DOE Democrat	MIKE ORE Republican			AGAINST	
GOVERNOR Vote for one	BILL COE Republican	TOM ROE Democrat				
Same for Lieutenar ttorney General, & tailroad and Publi uperintendent of P tupreme Court, Chie ussociate Justice of udges.)	State Treasurer, ic Service Common Public Instruction of Justice of the	State Auditor, missioners, State n, Clerk of the Supreme Court,				
attorney General, a callroad and Public uperintendent of Pupreme Court, Chieses a contact of the contact of the call of the ca	State Treasurer, ic Service Common Public Instruction of Justice of the	State Auditor, missioners, State n, Clerk of the Supreme Court,				INITIATIVE NO. 1
ttorney General, Saliroad and Publi uperintendent of Pupreme Court, Chiessociate Justice of udges.)	State Treasurer, ic Service Comp Public Instruction of Justice of the the Supreme Co JOE COE	State Auditor, missioners, State n, Clerk of the Supreme Court, urt and District TOM DOE				
ttorney General, sailroad and Publi uperintendent of Pupreme Court, Chiessociate Justice of idges.) STATE SENATOR Vote for one	State Treasurer, c Service Com rublic Instructior of Justice of the the Supreme Co JOE COE Republican JACK BOE	State Auditor, nisoioners, State in Clerk of the Supreme Court, urt and District TOM DOE Democrat ALLEN JOE	MIKE FOE		FOR	
ttorney General, Saliroad and Publi uperintendent of Pupreme Court, Chiessociate Justice of udges.)	State Treasurer, ce Service Com ubile Instruction of Justice of the the Supreme Co JOE COE Republican JACK BOE Democrat PETE COE	State Auditor, missioners, State , Clerk of the Supreme Court, urt and District TOM DOE Democrat ALLEN JOE Republican OLE KOE	MIKE FOE Independent JIM GOE		FOR	
ttorney General, sailroad and Publi uperintendent of Pupreme Court, Chiessociate Justice of tdges.) STATE SENATOR Vote for one MEMBER OF THE HOUSE OF REPRESENTATIVES	State Treasurer, e Service Com ubble Instruction of Justice of the the Supreme Co JOE COE Republican JACK BOE Democrat PETE COE Democrat BILL DOE	State Auditor, state of the Supreme Court, urt and District TOM DOE Democrat ALLEN JOE Republican OLE KOE Republican JOE MOE	MIKE FOE Independent JIM GOE Socialist BILL LOE			

History: En. 23-1608A by Sec. 2, Ch. 20, L. 1959.

word "Justice" in the sixth line of the parenthetical note in the ballot form for voting machines with vertical columns.

Compiler's Note

The compiler deleted a repetition of the

23-1609. (765) Irregular ballots. In case a voting machine be adopted which provides for the registry or recording of votes for candidates whose names are not on the official ballot, such ballots shall be denominated irregular ballots. A person whose name appears on a ballot, or on or in a machine or machine system, shall not be voted for for the same office or on or in any regular device for casting an irregular ticket, and any such vote shall not be counted, except for the office of presidential electors, and an elector may vote in or on such irregular device for one or more persons

nominated by one party with one or more persons nominated by any one or all other parties, or for one or more persons nominated by one or more parties with one or more persons not in nomination, or he may vote in such irregular device a presidential electoral ticket composed entirely of names of persons not in nomination.

History: En. Sec. 9, Ch. 168, L. 1907; Sec. 617, Rev. C. 1907; re-en. Sec. 765, R. C. M. 1921.

23-1610. (766) Counting the votes. As soon as the polls of the election are closed the judges shall immediately lock the machine, or remove the recording device so as to provide against voting, and open the registering or recording compartments in the presence of any person desiring to attend the same, and shall proceed to ascertain the number of votes cast for each person voted for at the election, and to canvass, record, announce, and return the same as provided by law.

History: En. Sec. 10, Ch. 168, L. 1907; Sec. 618, Rev. C. 1907; re-en. Sec. 766, R. C. M. 1921.

Collateral References Elections@=222. 29 C.J.S. Elections § 203.

23-1611. (767) **Election returns.** (1) The judges, as soon as the count is completed and fully ascertained, shall place the machine for one (1) hour in such a position that the registering or recording compartments will be in full view of the public and any person desiring to view the number of votes cast for each person voted for at the election, must be permitted to do so. Immediately after the above said one (1) hour shall have expired the judges shall seal, close, lock the machine or remove the record so as to provide against voting or being tampered with, and in case of a machine so sealed or locked, it shall so remain for a period of at least twenty (20) days, except when used in a municipal primary nominating election, unless opened by order of a court of competent jurisdiction or the county recount board. Whenever a machine has been used in a municipal primary nominating election, it shall remain sealed and locked for a period of at least five (5) days, unless opened by order of a court of competent jurisdiction. When irregular ballots have been voted, the judges shall return them in a properly sealed package endorsed "irregular ballots," and indicating the precinct and county and file such package with the city or county clerk. It shall be preserved for six (6) months after such election and may be opened and its contents examined only upon an order of a court of competent jurisdiction or the county recount board; at the end of such six (6) months unless ordered otherwise by the court, such package and its contents shall be destroyed by the city or county clerk. All tally sheets taken from such machine, if any, shall be returned in the same manner.

(2) The officers heretofore charged with the duty of furnishing tally sheets and return blanks shall furnish suitable return blanks and certificates to the officers of election. Such return sheets shall have each candidate's name designated by the same reference character that said candidate's name bears on the ballot labels and counters, and shall make provision for writing in of the vote for such candidate in figures and shall also provide for writing in of the vote in words. Such return sheet shall also provide for the re-

turn of the vote on questions. It shall also have a blank thereon, on which can be marked the precinct, ward, etc., of which said return sheet bears the returns and the number and make of the machine used. Said return sheet shall also have a certificate thereon, to be executed before the polls open by the judges of election, stating that all counters except the protective counter, if any, and except as otherwise noted thereon, stood at "000" at the beginning of the election, and that all of said counters had been carefully examined before the beginning of the election; that the ballot labels were correctly placed on the machine and correspond to the sample ballot, and such other statements as the particular machine may require; and shall provide for the signature of the election officers. Said return sheet shall also have thereon a second certificate stating the manner of closing the polls, the manner of verifying the returns, that the foregoing returns are correct, giving the indication of the public counter, and poll list, and protective counter, if any, at the close of the election. Such certificate shall properly specify the procedure of canvassing the vote and locking the machine, etc., for the particular type of machine used, and such certificate shall be such that the election officers can properly subscribe to it as having been followed and shall have provisions for the signature of the election officers. The election officers shall conform their procedure to that specified in the certificate to which they must certify. The certificate and attest of the election officers shall appear on each return sheet.

History: En. Sec. 11, Ch. 168, L. 1907; Sec. 619, Rev. C. 1907; amd. Sec. 3, Ch. 246, L. 1921; re-en. Sec. 767, R. C. M. 1921; amd. Sec. 16, Ch. 42, L. 1963; amd. Sec. 1, Ch. 57, L. 1963; amd. Sec. 10, Ch. 156, L. 1965.

Collateral References Elections 248, 250. 29 C.J.S. Elections §§ 230, 231.

23-1612. (768) Election laws applicable. All laws of this state applicable to elections where voting is done in another manner than by machine, and all penalties prescribed for violation of such laws, shall apply to elections and precincts where voting machines are used, in so far as they are not in conflict with the provisions of this chapter.

History: En. Sec. 12, Ch. 168, L. 1907; Sec. 620, Rev. C. 1907; re-en. Sec. 768, R. C. M. 1921.

23-1613. (769) Penalty for neglect of duty by election officer. Any public officer, or any election officer upon whom any duty is imposed by this act, who shall willfully neglect or omit to perform any such duties, or do any act prohibited herein for which punishment is not otherwise provided herein, shall, upon conviction, be imprisoned in the state prison for not less than one year or more than three years, or be fined in any sum not exceeding one thousand dollars, or may be punished by both such imprisonment and fine.

History: En. Sec. 13, Ch. 168, L. 1907; Sec. 621, Rev. C. 1907; re-en. Sec. 769, R. C. M. 1921. Collateral References Elections \$314. 29 C.J.S. Elections \$327.

23-1614. (770) Penalty for tampering with or injuring machines. Any person not being an election officer who, during any election or before any election, after a voting machine has had placed upon it the ballots for such

election, shall tamper with such machine, disarrange, deface, injure, or impair the same in any manner, or mutilate, injure, or destroy any ballot placed thereon or to be placed thereon, or any other appliance used in connection with such machine, shall be imprisoned in the state prison for a period of not more than ten years, or be fined not more than one thousand dollars, or be punished by both such fine and imprisonment.

History: En. Sec. 14, Ch. 168, L. 1907; Sec. 622, Rev. C. 1907; re-en. Sec. 770, R. C. M. 1921. Collateral References Elections©309. 29 C.J.S. Elections §§ 324, 334.

23-1615. (771) Penalty for violation of duty by judge of election. Whoever, being a judge of election, with intent to permit or cause any voting machine to fail to correctly register or record any vote cast thereon, tampers with or disarranges such machine in any way, or any part or appliance thereof, or who causes or consents to said machine being used for voting at any election with knowledge of the fact that the same is not in order or not perfectly set and adjusted, so that it will correctly register or record all votes cast thereon, or who, for the purpose of defrauding or deceiving any voter, or of causing it to be doubtful for what ticket or candidate or candidates or proposition any vote is cast, or of causing it to appear upon said machine that votes cast for one ticket, candidate, or proposition were cast for another ticket, candidate, or proposition, removes, changes, or mutilates any ballot on said machine, or any part thereof, or does any other like thing, shall be imprisoned in the state prison not more than ten years, or fined not exceeding one thousand dollars, or punished by both such fine and imprisonment

History: En. Sec. 15, Ch. 168, L. 1907; Sec. 623, Rev. C. 1907; re-en. Sec. 772, R. C. M. 1921.

23-1616. (772) Penalty for fraudulent returns or certificates. Any judge or clerk of an election who shall purposely cause the vote registered or recorded on or in such machine to be incorrectly taken down as to any candidate or proposition voted on, or who shall knowingly cause to be made or signed any false statement, certificate, or return of any kind, of such vote, or who shall knowingly consent to such things, or any of them, being done, shall be imprisoned in the state prison not more than ten years, or fined not more than one thousand dollars or punished by both such fine and imprisonment.

History: En. Sec. 16, Ch. 168, L. 1907; Sec. 624, Rev. C. 1907; re-en. Sec. 772, R. C. M. 1921.

23-1617. (773) Experimental use of machines—defective machines. The proper officers authorized by section 23-1603 to adopt voting machines, may provide for the experimental use at an election of a machine or machines, approved by the secretary of state, in one or more precincts, without a formal adoption or purchase thereof, and the use thereof at such election shall be as valid for all purposes as if formally adopted. If from any cause a machine becomes unworkable, or unfit for use, voting shall proceed as in cases where machines are not used, and the county clerk must furnish each voting place with the supply of ballots and other supplies required by the

election laws, to be used in case of emergency herein provided for, and in such case only.

History: En. Sec. 17, Ch. 168, L. 1907; Sec. 625, Rev. C. 1907; amd. Sec. 3, Ch. 99, re-en. Sec. 773, R. C. M. 1921; amd. Sec. 3, Ch. 19, L. 1943. L. 1909; amd. Sec. 4, Ch. 246, L. 1921;

23-1618. Approved machines—continuation of use. All voting machines heretofore approved in accordance with the provisions of said sections 23-1601 and 23-1602 prior to the amendment thereof by this act, and now owned and used by any of the several counties, cities or towns in this state, may be continued in use by such counties, cities and towns without the same being required to be again approved by the secretary of state in accordance with the provisions of said sections as hereby amended.

History: En. Sec. 4, Ch. 19, L. 1943.

CHAPTER 17

ELECTION RETURNS

Section 23-1701. Canvass to be public and without adjournment.

23-1702. Mode of canvassing.

23-1703. Where ballots are in excess of names on pollbooks.

23-1704. What ballots must be counted.

23-1705. Ascertaining the number of votes cast and persons voted for.

23-1706. Ballots to be strung and enclosed in sealed envelopes.

23-1707. Rejected ballots.

23-1708. Pollbooks-signing and certification of.

23-1710. Election returns by judges—how made. 23-1710. Castody of election returns.

23-1711. Delivery to county clerk.

23-1712. Filing of ballots and stubs by county clerk.

23,1773 Keeping returns pending contest.

5 23-1714: Disposition of returns prior to canvass of vote.

Clerk to file in his office books, papers, etc. 23-1715.

23-1701. (774) Canvass to be public and without adjournment. soon as the polls are closed, the judges must immediately proceed to canvass the votes given at such election. The canvass must be public in the presence of bystanders and must be continued without adjournment until completed and the result thereof is publicly declared.

History: Ap. p. Sec. 22, p. 380, Bannack Stat.; re-en. Sec. 22, p. 464, Cod. Stat. 1871; re-en. Sec. 21, p. 75, L. 1876; re-en. Sec. 535, 5th Div. Rev. Stat. 1879; re-en. Sec. 1027, 5th Div. Comp. Stat. 1887; amd. Sec. 1400, Pol. C. 1895; re-en. Sec. 572, Rev. C. 1907; re-en. Sec. 774, R. C. M. 1921. Cal. Pol. C. Sec. 1252.

Harrington v. Crichton, 53 M 388, 392, 164 P 537; Maddox v. Board of State Canvassers, 116 M 217, 223, 149 P 2d 112

Collateral References

Elections 259-261. 29 C.J.S. Elections § 237. 26 Am. Jur. 2d 122, Elections, § 298.

23-1702. (775) Mode of canvassing. The canvass must commence by a comparison of the pollbooks from the commencement, and the correction of any mistakes that may be found therein, until they are found to agree. The judges must then take out of the box the ballots unopened except to ascertain whether each ballot is single, and count the same to determine whether the number of ballots corresponds with the number of names on the pollbooks. If two or more ballots are found so folded

together as to present the appearance of a single ballot, they must be laid aside until the count of the ballots is completed, and if, on comparing the count with the pollbooks and further considering the appearance of such ballots, a majority of the judges are of the opinion that the ballots thus folded together were voted by one elector, they must be rejected; otherwise they must be counted.

History: Ap. p. Sec. 23, p. 380, Bannack Stat.; re-en. Sec. 23, p. 464, Cod. Stat. 1871; re-en. Sec. 22, p. 75, L. 1876; re-en. Sec. 546, 5th Div. Rev. Stat. 1879; re-en. Sec. 1028, 5th Div. Comp. Stat. 1887; amd. Sec. 1401, Pol. C. 1895; re-en. Sec. 573, Rev. C. 1907; re-en. Sec. 775, R. C. M. 1921; amd. Sec. 12, Ch. 64, L. 1959. Cal. Pol. C. Sec. 1253.

References

Harrington v. Crichton, 53 M 388, 392, 164 P 537.

Collateral References

Elections \$257. 29 C.J.S. Elections \$237 (3). 26 Am. Jur. 2d 122, Elections, \$298.

23-1703. (776) Where ballots are in excess of names on pollbooks. If the ballots then are found to exceed in number the whole number of names on the pollbooks, they must be placed in the box (after being purged in the manner above stated), and one of the judges must, publicly, and without looking in the box, draw therefrom singly and destroy unopened so many ballots as are equal to such excess. And the judges must make a record on the pollbooks of the number of ballots so destroyed.

History: Ap. p. Sec. 24, p. 380, Bannack Stat.; re-en. Sec. 24, p. 464, Cod. Stat. 1871; re-en. Sec. 23, p. 76, L. 1876; re-en. Sec. 537, 5th Div. Rev. Stat. 1879; re-en. Sec. 1029, 5th Div. Comp. Stat. 1887; amd. Sec. 1402, Pol. C. 1895; re-en. Sec. 574, Rev. C. 1907; re-en. Sec. 776, R. C. M. 1921; amd. Sec. 13, Ch. 64, L. 1959. Cal. Pol. C. Sec. 1255.

References

State ex rel. Riley v. District Court, 103 M 576, 588, 64 P 2d 115.

Collateral References

Elections 241. 29 C.J.S. Elections § 224.

23-1704. (777) What ballots must be counted. In the canvass of the votes, any ballot which is not endorsed as provided in this code by the official stamp is void and must not be counted, and any ballot or parts of a ballot from which it is impossible to determine the elector's choice is void and must not be counted; if part of a ballot is sufficiently plain to gather therefrom the elector's intention, it is the duty of the judges of election to count such part.

History: En. Sec. 30, p. 143, L. 1889; re-en. Sec. 1403, Pol. C. 1895; re-en. Sec. 575, Rev. C. 1907; re-en. Sec. 777, R. C. M. 1921.

Indistinct and Irregular Marking of Ballots

Where, from the manner in which a ballot was marked, it was impossible to determine the elector's choice, the ballot was void under this section, and should not have been counted in an election contest. Carwile v. Jones, 38 M 590, 598, 101 P 153.

A ballot bearing a rather indistinct "X" before contestant's name but sufficient to be discernible should have been counted for him where there was no erasure and the elector voted for no other candidate

for that office; and under the rule that the elector's intention must plainly appear, where the voter marked two squares for the office of sheriff, one of which showed an extra line through the "X" indicating perhaps, that the voter changed his mind but for the fact that squares before the names of other candidates were marked similarly, the intention was not clear and the ballot should not have been counted. Peterson v. Billings, 109 M 390, 392, 96 P 2d 922.

Liberal Construction—Intention of Voter

Under this section, and the rule that election laws must be liberally construed, a ballot showing the intersection of the "X" outside the square should have been counted for contestant, and one showing

the intersection of the cross squarely on the line of the square was properly so counted for him. Peterson v. Billings, 109 M 390, 393, 96 P 2d 922.

Official Stamp Missing

This section was enacted prior to the provision for a stub at the head of the ballot. The legislature, by providing for the stub to be numbered, and to be removed only at the time of depositing the ballot in the ballot box, has hit upon an effective method of guarding against fraud and illegal voting, and has ensured the deposit of the ballot in the ballot box, and the provisions of the section should now be construed in the light of the changed conditions. Hence where ballots had been delivered to electors by the judges of election with the official stamp apparently in the place in which the law requires it to be, although in reality it was on the stub instead of on the ballot

proper, the act of the judges in removing the stamp with the stub, thus leaving the ballot without the official designation, did not render the ballots void, and the same should have been counted. Harrington v. Crichton, 53 M 388, 396, 164 P 537.

School Elections

The validity of contested school elections is determined by the laws of general elections as set forth in this section. Woolsey v. Carney, 141 M 476, 378 P 2d 658.

References

State ex rel. Brooks v. Fransham, 19 M 273, 292, 48 P 1; Goodell v. Judith Basin County, 70 M 222, 242, 224 P 1110; State ex rel. Riley v. District Court, 103 M 576, 588, 64 P 2d 115.

Collateral References

Elections © 224. 29 C.J.S. Elections § 211.

23-1705. (778) Ascertaining the number of votes cast and persons voted for. The ballots and poll lists agreeing or being made to agree, the judges must then proceed to count and ascertain the number of votes cast for each person voted for. In making such count the ballots must be opened singly by one of the judges, and the contents thereof, while exposed to the view of the other judges, must be distinctly read aloud by the judge who opens the ballot. As the ballots are read, each clerk must write at full length on a sheet to be known as a tally sheet the name of every person voted for and of the office for which he received votes, and keep by tallies on such sheet the number of votes for each person. The tally sheets must then be compared and their correctness ascertained, and the clerks must, under the supervision of the judges, immediately thereafter set down, at length and in their proper places in the pollbooks, the names of all persons voted for, the offices for which they respectively received votes, and the total number of votes received by each person, as shown by the tally sheets. No ballot or vote rejected by the judges must be included in the count provided for in this section.

History: Ap. p. Sec. 25, p. 380, Bannack Stat.; re-en. Sec. 25, p. 464, Cod. Stat. 1871; re-en. Sec. 24, p. 76, L. 1876; re-en. Sec. 538, 5th Div. Rev. Stat. 1879; re-en. Sec. 1030, 5th Div. Comp. Stat. 1887; amd. Sec. 1404, Pol. C. 1895; re-en. Sec. 576, Rev. C. 1907; re-en. Sec. 778, R. C. M. 1921.

References

Dubic v. Batani, 97 M 468, 476, 37 P 2d 662; Maddox v. Board of State Canvassers, 116 M 217, 223, 149 P 2d 112; State ex rel. Thomas v. District Court, 116 M 510, 513, 154 P 2d 980.

Collateral References
Elections 241.
29 C.J.S. Elections § 224.

23-1706. (779) Ballots to be strung and enclosed in sealed envelopes. The ballots, as soon as read or rejected for illegality, must be strung upon a string by one of the judges, and must not thereafter be examined by any person, but must, as soon as all legal ballots are counted, be carefully sealed in a strong envelope, each member of the judges writing his name across the seal.

History: En. Sec. 1405, Pol. C. 1895; re-en. Sec. 577, Rev. C. 1907; re-en. Sec. 779, R. C. M. 1921. Cal. Pol. C. Sec. 1259.

Failure To String Voted Ballots

Failure of the judges of election of a voting precinct to place the voted ballots on a string in compliance with the provisions of this section did not obstruct or prevent the ascertainment of the result of the election, and was insufficient to impeach the returns of the precinct. Dubie v. Batani, 97 M 468, 479, 37 P 2d 662.

Collateral References

Elections 255. 29 C.J.S. Elections § 234.

23-1707. (780) Rejected ballots. Any ballot rejected for illegality must be marked by the judges, by writing across the face thereof "Rejected on the ground of," filling the blank with a brief statement of the reasons for the rejection, which statement must be dated and signed by a majority of the judges.

History: En. Sec. 1406, Pol. C. 1895; re-en. Sec. 578, Rev. C. 1907; re-en. Sec. 780, R. C. M. 1921.

Collateral References Elections©224. 29 C.J.S. Elections § 211.

23-1708. (781) Pollbooks—signing and certification of. As soon as all the votes are counted and the ballots sealed up, the pollbooks must be signed and certified to by the judges and clerks of election substantially as in the form in section 23-702.

History: En. Sec. 1407, Pol. C. 1895; re-en. Sec. 579, Rev. C. 1907; re-en. Sec. 781, R. C. M. 1921.

23-1709. (782) Election returns by judges—how made. The judges must, before they adjourn, enclose in a strong envelope, securely sealed and directed to the county clerk, the precinct registers, all certificates of registration received by them, the lists of persons challenged, both of the pollbooks, both of the tally sheets, and the official oaths taken by the judges and clerks of election; and must enclose in a separate package or envelope, securely sealed and directed to the county clerk, all unused ballots with the numbered stubs attached; and must also enclose in a separate package or envelope, securely sealed and directed to the county clerk, all ballots voted, including all voted ballots which, for any reason, were not counted or allowed, and all detached stubs from ballots voted, and endorse on the outside thereof "ballots voted." Each of the judges must write his name across the seal of each of said envelopes or packages. The ballot box must be returned to the county clerk.

History: Ap. p. Sec. 1408, Pol. C. 1895; amd. Sec. 6, Ch. 88, L. 1907; re-en. Sec. 580, Rev. C. 1907; re-en. Sec. 782, R. C. M. 1921; amd. Sec. 1, Ch. 112, L. 1937; amd. Sec. 1, Ch. 65, L. 1943; amd. Sec. 1, Ch. 23, L. 1945; amd. Sec. 14, Ch. 64, L. 1959.

Construction

The law contemplates that the election board in the precinct will return to the clerk and recorder but one tally sheet and one copy of the pollbook. State ex rel. Lynch v. Batani, 103 M 353, 361, 62 P 2d 565.

References

Dubie v. Batani, 97 M 468, 478, 37 P 2d 662.

Collateral References

Elections \$241, 248-250. 29 C.J.S. Elections §§ 224, 230, 231.

23-1710. (784) Custody of election returns. The sealed envelope containing the check lists, certificates of registration, pollbook, tally sheets, oaths of election officers, also the package or envelope containing the voted ballots and detached stubs and the package or envelope containing the

unused ballots, must, before the judges adjourn, be delivered to one of their number, to be determined by lot, unless otherwise agreed upon.

History: Ap. p. Sec. 1410, Pol. C. 1895; amd. Sec. 7, Ch. 88, L. 1907; re-en. Sec. 582, Rev. C. 1907; re-en. Sec. 784, R. C. M. 1921; amd. Sec. 2, Ch. 23, L. 1945. Cal. Pol. C. Sec. 1263.

Collateral References
Elections \$251.
29 C.J.S. Elections \$232.

23-1711. (785) Delivery to county clerk. The judges to whom such packages are delivered must, within twenty-four hours, deliver them, without their having been opened, to the county clerk, or convey the same, unopened, to the post office nearest the house in which the election for such precinct was held, and register and mail the same, duly directed to the said clerk.

History: En. Sec. 1411, Pol. C. 1895; re-en. Sec. 583, Rev. C. 1907; re-en. Sec. 785, R. C. M. 1921.

23-1712. (786) Filing of ballots and stubs by county clerk. Upon the receipt of the packages or envelopes by the county clerk, he must file the package or envelope containing the ballots voted and detached stubs and the package or envelope containing the unused ballots, and must keep them unopened and unaltered for twelve (12) months, after which time, if there is no contest commenced in some tribunal having jurisdiction about such election or a recount is had as provided by law, he must burn such packages, or envelopes, without opening or examining their contents.

History: Ap. p. Sec. 1412, Pol. C. 1895; amd. Sec. 8, Ch. 88, L. 1907; re-en. Sec. 584, Rev. C. 1907; re-en. Sec. 786, R. C. M. 1921; amd. Sec. 3, Ch. 23, L. 1945; amd. Sec. 17, Ch. 42, L. 1963. Cal. Pol. C. Sec. 1265.

Collateral References
Elections©=255.
29 C.J.S. Elections § 234.

23-1713. (787) Keeping returns pending contest. If, within twelve months, there is such a contest commenced, he must keep the packages of envelopes unopened and unaltered until it is finally determined, when he must, as provided in the preceding section, destroy them, unless the same are by virtue of an order of the tribunal in which the contest is pending, brought and opened before it to the end that evidence may be had of their contents, in which event the packages or envelopes and their contents are in the custody of such tribunal.

History: Ap. p. Sec. 1413, Pol. C. 1895; amd. Sec. 9, Ch. 88, L. 1907; re-en. Sec. 585, Rev. C. 1907; re-en. Sec. 787, R. C. M. 1921. Cal. Pol. C. Sec. 1266.

References
Lane v. Bailey, 29 M 548, 560, 75 P 191.

23-1714. (788) Disposition of returns prior to canvass of vote. The envelopes containing the precinct registers, certificates of registration, pollbooks, tally sheets, and oaths of election officers must be filed by the county clerk and be kept by him, unopened and unaltered, until the board of county commissioners meet for the purpose of canvassing the returns, when he must produce them before such board, where the same shall be opened.

History: Ap. p. Sec. 1414, Pol. C. 1895; amd. Sec. 10, Ch. 88, L. 1907; re-en. Sec. 586, Rev. C. 1907; re-en. Sec. 788, R. C. M. 1921; amd. Sec. 15, Ch. 64, L. 1959.

References

Maddox v. Board of State Canvassers, 116 M 217, 225, 149 P 2d 112.

23-1715. (789) Clerk to file in his office books, papers, etc. As soon as the returns are canvassed, the clerk must file in his office the pollbooks, election records and the papers produced before the board from the package mentioned in the next preceding section.

History: En. Sec. 1415, Pol. C. 1895; 789, R. C. M. 1921; amd. Sec. 16, Ch. 64, re-en. Sec. 587, Rev. C. 1907; re-en. Sec. L. 1959, Cal. Pol. C. Sec. 1268.

CHAPTER 18

CANVASS OF ELECTION RETURNS—RESULTS AND CERTIFICATES

Section 23-1801. Meeting of county commissioners to canvass returns.

23-1802. In case of absence certain county officers to act.

23-1803. Canvass to be postponed, when.

23-1804. Canvass to be public.

23-1805. Statement of the result to be entered of record.

23-1806. Plurality to elect.

23-1807. Duty of canvassing board. 23-1808. Certificates issued by the clerk.

23-1809 to 23-1811. Repealed. 23-1812. State returns, how made.

23-1813. How transmitted.

23-1814. State canvassers, composition and meeting of board.

23-1815. Messenger may be sent for returns—his duty and compensation.

23-1816. Governor to issue commissions.

23-1817. Defect in form of returns to be disregarded. 23-1818. Duty of secretary of state to print election laws.

23-1819. Penalties.

23-1801. (790) Meeting of county commissioners to canvass returns. The board of county commissioners of each county is ex officio a board of county canvassers for the county, and must meet as the board of county canvassers at the usual place of meeting of the county commissioners within ten days after each election, at twelve o'clock noon, to canvass the returns.

History: En. Sec. 2, p. 299, L. 1891; amd. Sec. 1430, Pol. C. 1895; re-en. Sec. 588, Rev. C. 1907; re-en. Sec. 790, R. C. M. 1921. Cal. Pol. C. Sec. 1278.

Wulf v. McGrath, 111 M 96, 100, 106 P 2d 183; Maddox v. Board of State Canvassers, 116 M 217, 225, 149 P 2d 112.

References

State ex rel. Cryderman v. Wienrich, 54 M 390, 400, 170 P 942; State ex rel.

Collateral References

Elections \$\infty 258.
29 C.J.S. Elections \\$ 236.
26 Am. Jur. 2d 122, Elections, \\$ 298.

23-1802. (791) In case of absence certain county officers to act. If, at the time and place appointed for such meeting, one or more of the county commissioners should not attend, the place of the absentees must be supplied by one or more of the following county officers, whose duty it is to act in the order named, to wit, the treasurer, the assessor, the sheriff, so that the board of county canvassers shall always consist of three acting members. The clerk of the board of county commissioners is the clerk of the board of county canvassers.

History: Ap. p. Sec. 2, p. 299, L. 1891; amd. Sec. 1431, Pol. C. 1895; re-en. Sec. 589, Rev. C. 1907; re-en. Sec. 791, R. C. M. 1921.

Reconvening of County Board of Canvassers

The members of a county board of canvassers do not necessarily embrace the same officers, but are subject to changes which depend upon circumstances, and a writ of mandate, issued to compel such board to reconvene and canvass the returns from an election precinct which they had excluded, is properly directed to the particular individuals comprising the board, describing them by name, and as constituting the board of county canvassers of election returns for a certain county of the state, the particular members of such board at the time in ques-

tion being the persons against whom obedience must, if necessary, be enforced. State ex rel. Leech v. Board of Canvassers of Choteau County, 13 M 23, 29, 31 P 879.

References

State ex rel. Cryderman v. Wienrich, 54 M 390, 400, 170 P 942.

Collateral References

Elections ≈ 257. 29 C.J.S. Elections § 235.

23-1803. (792) Canvass to be postponed, when. If, at the time of meeting, the returns from each precinct in the county in which polls were opened have been received, the board of county canvassers must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day until all of the returns are received, or until seven postponements have been had. If the returns from any election precinct have not been received by the county clerk within seven days after any election, it is his duty forthwith to send a messenger to the judges for the missing returns, who must procure such returns from the judges, or any of them, and return the same to the county clerk. Such messenger must be paid out of the county treasury fifteen cents per mile in going and coming. If it appears to the board, by evidence, that the polls were not opened in any precinct, and no returns have been received therefrom, the board must certify to the same, and file such certificate with the county clerk, with the evidence, if any, who must enter the same in the minutes and in the statement mentioned in section 23-1805.

History: Ap. p. Sec. 3, p. 300, L. 1891; amd. Sec. 1432, Pol. C. 1895; re-en. Sec. 590, Rev. C. 1907; re-en. Sec. 792, R. C. M. 1921, Cal. Pol. C. Sec. 1280.

References

State ex rel. Cryderman v. Wienrich, 54 M 390, 400, 170 P 942.

23-1804. (793) Canvass to be public. The canvass must be made in public by opening the returns and determining therefrom the vote of such county or precinct for each person voted for, and for and against each proposition voted upon at such election, and declaring the result thereof. In canvassing, no returns must be rejected if it can be ascertained therefrom the number of votes cast for each person. The fact that the returns do not show who administered the oath to the judges or clerks of election, or a failure to fill out all the certificates in the pollbooks, or to do or perform any other act in making up the returns, that is not essential to determine for whom the votes were cast, is not such an irregularity as to entitle the board to reject the same, but they must be canvassed as other returns are.

History: En. Secs. 4 and 5, p. 301, L. 1891; re-en. Sec. 1433, Pol. C. 1895; re-en. Sec. 591, Rev. C. 1907; re-en. Sec. 793, R. C. M. 1921. Cal. Pol. C. Sec. 1281.

Exclusion of Returns

A county board of canvassers has no authority to inquire into the validity of a certificate of nomination of a nominee for office, and therefore, where the election returns are genuine and properly certified, prohibition will not lie to restrain the board from canvassing such returns and counting the vote cast for such person, as required by sections 4 and 6, pages 301, 302 of the Laws of 1891, upon the ground that the nomination was invalid. Pigott v. Board of Canvassers of Cascade County, 12 M 537, 538, 31 P 536.

The duties of a county canvassing board are ministerial, and such board has no authority to exclude the returns of an election precinct, regularly made, upon the ground that the voting was shown by affidavits to be illegal, and, having done so, may be compelled by mandamus to canvass such returns. State ex rel. Leech v. Board of Canvassers of Choteau County, 13 M 23, 30, 31 P 879. See also State ex rel. Breen v. Toole, 32 M 4, 10, 79 P 403; Poe v. Sheridan County, 52 M 279, 288, 157 P 185.

Where a county canvassing board issued a certificate of election to a candidate for the legislative assembly after unlawfully excluding the returns of a particular precinct, and then adjourned sine die, such board may be compelled by mandamus to reconvene and canvass the returns so excluded, and issue a certificate of election to the person shown by a complete canvass to be entitled thereto.

State ex rel. Leech v. Board of Canvassers of Choteau County, 13 M 23, 31, 31 P 879.

Returns in the pollbook being left blank, and the certificate thereto not being properly filled in, are not grounds for rejecting returns, nor are they such irregularities as will entitle a board of canvassers to reject them. State cx rel. Leech v. Board of Canvassers of Choteau County, 13 M 23, 31, 31 P 879.

It is the duty of the board of canvassers to procure the check lists and surrendered lists before rejecting the vote of a precinct as returned by the pollbooks alone. State ex rel. Leech v. Board of Canvassers of Choteau County, 13 M 23, 31, 31 P 879.

References

Stephens v. Nacey, 47 M 479, 485, 133 P 361.

Collateral References
Elections \$259.
29 C.J.S. Elections \$237.

23-1805. (794) Statement of the result to be entered of record. The clerk of the board must, as soon as the result is declared, enter on the records of such board a statement of such result, which statement must show:

- 1. The whole number of votes cast in the county.
- 2. The names of the persons voted for and the propositions voted upon.
- 3. The office to fill which each person was voted for.
- 4. The number of votes given at each precinct to each of such persons, and for and against each of such propositions.
- 5. The number of votes given in the county to each of such persons, and for and against each of such propositions.

History: En. Sec. 6, p. 301, L. 1891; re-en. Sec. 1434, Pol. C. 1895; re-en. Sec. 592, Rev. C. 1907; re-en. Sec. 794, R. C. M. 1921. Cal. Pol. C. Sec. 1282.

Collateral References Elections \$259. 29 C.J.S. Elections \$237.

23-1806. (795) Plurality to elect. The person receiving at any election the highest number of votes for any office to be filled at such election is elected thereto.

History: En. Sec. 1170, Pol. C. 1895; re-en. Sec. 456, Rev. C. 1907; re-en. Sec. 795, R. C. M. 1921. Cal. Pol. C. Sec. 1066.

Where Deceased Candidate Received Majority of Votes, Highest Write-in Candidate Held Elected

Where a candidate for re-election to a county office died 24 days before election, his death known generally to electors, but his name placed on ballot and majority voted for him supposing to retain his widow, appointed to fill the vacancy, until the next general election, a write-in candi-

date whom they intended to defeat, receiving the highest vote east for any living person, held, on his application for writ of mandate to compel the county canvassing board to reconvene and cause certificate of election issued to him, that write-in candidate elected and entitled to the office. State ex rel. Wolff v. Geurkink, 111 M 417, 426, 109 P 2d 1094, 133 ALR 304.

Collateral References

Elections 237. 29 C.J.S. Elections § 241.

23-1807. (796) Duty of canvassing board. The board must declare elected the person having the highest number of votes given for each

office to be filled by the votes of a single county or a subdivision thereof, except members of the legislative assembly. If a recount shall show that two or more persons received an equal and sufficient number of votes to elect to the office of state senator, or member of the house of representatives, the state recount board shall certify such facts to the governor.

History: En. Sec. 6, p. 302, L. 1891; re-en. Sec. 1435, Pol. C. 1895; re-en. Sec. 593, Rev. C. 1907; amd. Sec. 1, Ch. 84, L. 1909; re-en. Sec. 796, R. C. M. 1921; amd. Sec. 18, Ch. 42, L. 1963; amd. Sec. 8, Ch. 194, L. 1967.

Collateral References Elections 259, 260. 29 C.J.S. Elections § 237.

23-1808. (797) Certificates issued by the clerk. The clerk of the board of county commissioners must immediately make out and deliver to such persons (except to the person elected district judge) a certificate of election signed by him and authenticated with the seal of the board of county commissioners, and said certificate shall contain therein written notice that the official bond of the elected or appointed official must be filed within thirty (30) days after notice of election or appointment, and that failure to file such bond shall cause the office to become vacant.

History: En. Sec. 7, p. 302, L. 1891; re-en. Sec. 1436, Pol. C. 1895; re-en. Sec. 594, Rev. C. 1907; re-en. Sec. 797, R. C. M. 1921; amd. Sec. 1, Ch. 50, L. 1959. Cal. Pol. C. Sec. 1284.

Cross-Reference

County clerk to issue certificate of election, sec. 16-1157.

Repeal

These sections (Secs. 8, 9, pp. 302, 303, L. 1891; Secs. 1437 to 1439, Pol. C. 1895), relating to returns for election of legislators representing more than one county, were repealed by Sec. 13, Ch. 194, Laws

References

State ex rel. Wallace v. Callow, 78 M 308, 315, 254 P 187; State ex rel. Riley v. District Court, 103 M 576, 581, 64 P 2d 115.

Collateral References

Elections 265. 29 C.J.S. Elections § 240.

23-1809 to 23-1811. (798 to 800) Repealed—Chapter 194, Laws of 1967.

1967. However, the title of the repealing act, apparently through clerical error, listed 23-1812 as repealed, instead of this section. For present law, see secs. 23-1812 to 23-1814.

(801) State returns, how made. When there has been a general or special election for officers voted for by the electors of the state at large, for members of the legislative assembly, or for judicial officers (except justices of the peace), each clerk of the board of county canvassers, so soon as the statement of the vote of his county is made out and entered upon the records of the board of county commissioners, must make a certified abstract of so much thereof as relates to the votes given for persons for said offices to be filled at such election.

History: En. Sec. 10, p. 303, L. 1891; amd. Sec. 1440, Pol. C. 1895; re-en. Sec. 598, Rev. C. 1907; re-en. Sec. 801, R. C. M. 1921; amd. Sec. 9, Ch. 194, L. 1967. Cal. Pol. C. Sec. 1288.

Statutes In Pari Materia with Others

This section and sections 23-1813 and 23-1814, relating to canvassers' abstract to secretary of state, and section 23-2301 et seq., authorizing recount of votes, etc., are in pari materia and must be construed together, both the county and state board of canvassers being governed by the former

provisions in case the result of the election is changed upon a recount. State ex rel. Riley v. District Court, 103 M 576, 583, 64 P 2d 115.

References

Herweg v. Thirty Ninth Legislative Assembly of State of Montana, 246 F Supp

Collateral References

Elections 247. 29 C.J.S. Elections § 229. 23-1813. (802) How transmitted. The clerk must seal up such abstract, endorse it "Election Returns," and without delay transmit it to the secretary of state by certified mail.

History: En. Sec. 11, p. 303, L. 1891; re-en. Sec. 1441, Pol. C. 1895; re-en. Sec. 599, Rev. C. 1907; re-en. Sec. 802, R. C. M. 1921; amd. Sec. 1, Ch. 87, L. 1959. Cal. Pol. C. Sec. 1289.

References

Herweg v. Thirty Ninth Legislative Assembly of State of Montana, 246 F Supp 454.

Collateral References

Elections 251. 29 C.J.S. Elections § 232.

23-1814. (803) State canvassers, composition and meeting of board. Within thirty days after the election and sooner if the returns be all received, the state auditor, state treasurer, and attorney general, who constitute a board of state canvassers, must meet in the office of the secretary of state and compute and determine the vote, and the secretary of state, who is secretary of said board, must make out and file in his office a statement thereof and transmit a copy of such statement to the governor.

History: En. Sec. 14, p. 304, L. 1891; amd. Sec. 1442, Pol. C. 1895; re-en. Sec. 600, Rev. C. 1907; re-en. Sec. 803, R. C. M. 1921; amd. Sec. 1, Ch. 55, L. 1949. Cal. Pol. C. Sec. 1290.

References

Herweg v. Thirty Ninth Legislative Assembly of State of Montana, 246 F Supp 454.

Collateral References

Elections 258, 259. 29 C.J.S. Elections §§ 236, 237.

23-1815. (804) Messenger may be sent for returns—his duty and compensation. If the returns from all the counties have not been received on the fifth day before the day designated for the meeting of the board of state canvassers, the secretary of state must forthwith send a messenger to the clerk of the board of county canvassers of the delinquent county, and such clerk must furnish the messenger with a certified copy of the statement mentioned in section 23-1805. The person appointed is entitled to receive as compensation five dollars per day for the time necessarily consumed in such service, and the traveling expenses necessarily incurred. His account therefor, certified by the secretary of state, must be paid out of the general fund of the state treasury.

History: Ap. p. Secs. 12 and 13, L. 1891; amd. Sec. 1443, Pol. C. 1895; re-en. Sec. 601, Rev. C. 1907; re-en. Sec. 804, R. C. M. 1921; amd. Sec. 16, Ch. 97, L. 1961.

Collateral References

Elections \$252. 29 C.J.S. Elections § 229.

23-1816. (805) Governor to issue commissions. Upon receipt of such copy mentioned in section 23-1814, the governor must issue commissions to the persons who from it appear to have received the highest number of votes for offices to be filled at such election. In case a governor has been elected to succeed himself, the secretary of state must issue the commission.

454.

History: En. Sec. 15, p. 304, L. 1891; amd. Sec. 1444, Pol. C. 1895; re-en. Sec. 602, Rev. C. 1907; re-en. Sec. 805, R. C. M. 1921. Cal. Pol. C. Sec. 1291.

Callateral Deference

sembly of State of Montana, 246 F Supp

Collateral References

References

States € 48. 81 C.J.S. States § 76.

Herweg v. Thirty Ninth Legislative As-

23-1817. (806) Defect in form of returns to be disregarded. No declaration of the result, commission, or certificate must be withheld on account of any defect or informality in the return of any election, if it can with reasonable certainty be ascertained from such return what office is intended and who is elected thereto.

History: En. Sec. 17, p. 305, L. 1891; re-en. Sec. 1448, Pol. C. 1895; re-en. Sec. 606, Rev. C. 1907; re-en. Sec. 806, R. C. M. 1921. Cal. Pol. C. Sec. 1297.

Collateral References

Elections 257, 265; States 48. 29 C.J.S. Elections §§ 235, 240; 81 C.J.S. States § 76.

References

23-1817

Stephens v. Nacey, 47 M 479, 485, 133 P 361.

23-1818. (807) Duty of secretary of state to print election laws. It is the duty of the secretary of state to cause to be published, in pamphlet form, a sufficient number of copies of election laws and such other provisions of law as bear upon the subject of elections, and to transmit the proper number to each county clerk, whose duty it is to furnish each election officer in his county with one of such copies.

History: En. Sec. 18, p. 305, L. 1891; 607, Rev. C. 1907; re-en. Sec. 807, R. C. M. re-en. Sec. 1449, Pol. C. 1895; re-en. Sec. 1921.

23-1819. (808) Penalties. The penalties for the violation of election laws are prescribed in sections 94-1401 to 94-1474.

History: En. Sec. 1450, Pol. C. 1895; re-en. Sec. 608, Rev. C. 1907; re-en. Sec. 808, R. C. M. 1921.

section, was repealed by Sec. 4, Ch. 50, Laws 1947.

Compiler's Note

Section 94-1461, included in the reference to sections 94-1401 to 94-1474 in this

Collateral References

Elections@=309 et seq. 29 C.J.S. Elections §§ 324, 334.

CHAPTER 19

FAILURE OF ELECTIONS—PROCEEDINGS ON TIE VOTE

Section 23-1901. Tie vote on representative in Congress.

23-1902. Proceedings on tie vote. 23-1903. Tie vote on state officers. 23-1904. Tie vote on judicial officers.

23-1901. (809) Tie vote on representative in Congress. In case of a failure, by reason of a tie vote or otherwise, to elect a representative in Congress, the secretary of state must transmit to the governor a certified statement showing the vote cast for such persons voted for, and in case of a failure to elect, by reason of a tie vote or otherwise, the governor must order a special election.

History: En. Sec. 16, p. 305, L. 1891; re-en. Sec. 1447, Pol. C. 1895; re-en. Sec. 605, Rev. C. 1907; re-en. Sec. 809, R. C. M. 1921.

Collateral References

Elections 238. 29 C.J.S. Elections § 244.

23-1902. (810) Proceedings on tie vote. In case any two or more persons have an equal and highest number of votes for either governor, lieutenant governor, secretary of state, attorney general, state auditor, state treasurer, clerk of the supreme court, superintendent of public instruc-

tion, or any other state executive officer, the legislative assembly, at its next regular session, must forthwith, by joint ballot of the two houses, elect one of such persons to fill such office; and in case of a tie vote for clerk of the district court, county attorney, or any county officer except county commissioner, and for any township officer, the board of county commissioners must appoint some eligible person, as in case of other vacancies in such offices; and in case of a tie vote for county commissioner, the district judge of the county must appoint an eligible person to fill the office, as in other cases of vacancy.

History: En. Sec. 1171, Pol. C. 1895; re-en. Sec. 457, Rev. C. 1907; re-en. Sec. 810, R. C. M. 1921. Cal. Pol. C. Secs. 1067-1068.

Clerk of District Court

The provisions of the constitution, fixing the terms of judicial officers, are exclusive, and vacancies occur by operation of law upon the expiration of the terms designated, even where the people fail to elect their successors; hence, if, by reason of a tie vote, there is a failure to elect the successor of a clerk of a district court upon the expiration of the incumbent's term, there is a vacancy which the county commissioners are authorized, under this section, to fill by appointment. State ex rel. Jones v. Foster, 39 M 583, 592, 104 P 860. See also State ex rel. Patterson v. Lentz, 50 M 322, 336, 146 P 932.

If there is a clause in the constitution providing that an officer shall hold for a definite term and until his successor is elected and qualified, and the people fail to elect his successor, there is no vacancy, and he is entitled to hold over until the people have chosen his successor in the usual way; but, in the case of judicial officers, whose terms end at the expiration of a definitely fixed period, the words "and until his successor is elected and qualified," refer to those officers only who were first elected after the adoption of the constitution; they have no application to those chosen after such first election. State ex rel. Jones v. Foster, 39 M 583, 586, 104 P 860.

County School Superintendent

This section does not in terms declare that a vacancy in office shall occur when there has been no election to the office by reason of a tie vote. In so far as it relates to officers named in the constitution (county school superintendent) and the authority of the county commissioners to fill vacancies therein, it is invalid. State ex rel. Chenoweth v. Acton, 31 M 37, 40, 77 P 299. See State ex rel. Jones v. Foster, 39 M 583, 591, 104 P 860.

23-1903. (811) Tie vote on state officers. In case of a tie vote for state officers, as specified in the preceding section, it is the duty of the secretary of state to transmit to the legislative assembly, at its next regular session, a certified copy of the statement showing the vote cast for the two or more persons having an equal and the highest number of votes for any state office.

History: En. Sec. 1445, Pol. C. 1895; re-en. Sec. 603, Rev. C. 1907; re-en. Sec. 811, R. C. M. 1921.

23-1904. (812) Tie vote on judicial officers. In case any two or more persons have an equal and highest number of votes for justice of the supreme court, or judge of a district court, or member of the legislative assembly, the secretary of state must transmit to the governor a certified statement showing the vote cast for such person, and thereupon the governor must appoint an eligible person to hold office as in case of other vacancies in such offices.

History: En. Sec. 1446, Pol. C. 1895; re-en. Sec. 604, Rev. C. 1907; re-en. Sec. 812, R. C. M. 1921; amd. Sec. 10, Ch. 194, L. 1967.

Collateral References

Elections 238; Judges 8.
29 C.J.S. Elections § 244; 48 C.J.S.
Judges § 32.

CHAPTER 20

NONPARTISAN NOMINATION AND ELECTION OF JUDGES OF SUPREME COURT AND DISTRICT COURTS

Section 23-2001. Nomination and election of district court and supreme court judges.

23-2002. Nominations.

23-2003. Petition for nomination—contents—form—filing—fees.

Register of candidates for nomination.

23-2004. 23-2005. Arrangement and certification of judicial candidates—separate from party designation.

23-2006. Primary ballots-preparation and distribution.

23-2007. Judicial primary ballots—voting.
23-2008. Separate counting and canvassing of judicial ballots—application of general laws.

23-2009. Nominations—placing names on ballots. 23-2010. Tie vote, how decided.

23-2011. Vacancies among nominees after nomination and before general election, how filled.

23-2012. Unlawful for political party to endorse judicial candidate.

23-2013. Repealed.

23-2014. Repealing clause—application of general laws.

23-2001. (812.1) Nomination and election of district court and supreme court judges. That hereafter all candidates for the office of justice of the supreme court of the state of Montana or judge of the district court in any judicial district of the state of Montana, shall be nominated and elected in accordance with the provisions of this act and in no other manner.

Each vacancy for associate justice of the supreme court is to be considered as a separate and independent office for election purposes, and to facilitate the nomination and election of candidates thereto, the chief justice of the supreme court shall assign an individual number to the four (4) associate justices and certify these numbers to the office of the secretary of state not less than one hundred eighty (180) days before the date of the primary nominating election.

Each department in a judicial district which has more than one (1) judge of the district court is to be considered as a separate and independent office for election purposes.

History: En. Sec. 1, Ch. 182, L. 1935; amd. Sec. 2, Ch. 229, L. 1961.

Purpose of Nonpartisan Judiciary Act

The purpose of the Nonpartisan Judiciary Act (23-2001 et seq.), is to eliminate, so far as possible, the selection of judges from partisan politics, and the phrase found in this section, declaring that candidates for judicial office "shall be nominated and elected in accordance with the provisions of this act and in no other manner," intended merely to exclude the

selection of judges on a party ticket. The word "candidate" as used in this act should not receive a different construction from that as used in the general primary law. The act must be construed in pari materia with the primary and general election laws. State ex rel. McHale v. Ayers, 111 M 1, 3, 105 P 2d 686.

Collateral References

Judges 3. 48 C.J.S. Judges § 12. 25 Am. Jur. 2d 814, Elections, § 128.

23-2002. (812.2) Nominations. Candidates for any office within the provisions of this act, to be filled at any election to be held in the state of Montana, shall be nominated in the manner herein provided at the regular primary nominating election provided by law for the nomination of other candidates for other offices to be filled at such election, and all laws relating to such primaries shall continue to be in force and to be applicable to the said offices in so far as may be consistent with the provisions of this act.

History: En. Sec. 2, Ch. 182, L. 1935. References
State ex rel. McHale v. Ayers, 111 M 1,
4, 105 P 2d 686.

fees. All persons who shall desire to become candidates for nomination to any office within the provisions of this act shall prepare, sign and file

23-2003.

(812.3) Petition for nomination — contents — form — filing—

petitions for nomination in compliance with the requirements of the primary election laws, which petition for nomination shall be substantially
in the following form: To(Name
and title of officer with whom the petition is to be filed), and to the electors
of the(state or counties of
comprising the district or county as the case may be) in the state of Mon-
tana:
I,, reside at,
and my post-office address is
on the nonpartisan judicial ticket for the nomination for the office of
at the primary nominating election to be
held in the(state of Montana or district or
county), on the day of, 19, and if I am
nominated as a candidate for such office I will accept the nomination and
will not withdraw and if I am alacted I will qualify as such officer

Each person filing a petition for nomination to the office of associate justice of the supreme court shall, in the blank wherein he indicates the office for which the petition for nomination is being filed, designate the number of the associate justice whose office he is seeking. Each person filing a petition can make only one (1) such designation.

All persons who shall desire to become candidates for nomination as judge of the district court in any district having more than one (1) judge shall specify in said petition for nomination the number of the department to which they seek nomination and election, and their candidacy shall be limited solely to the numbered department so specified, it being intended hereby that the office of judge of each respective numbered department shall be filled in all respects as though each of said numbered departments were an entirely separate and independent elective office.

Provided, however, that no such petition for judicial office shall indicate the political party or political affiliations of the candidate, and provided further that no candidate for judicial office may in his petition for nomination state any measures or principles he advocates, or have any statement of measures or principles which he advocates, or any slogans, after his name on the nominating ballot as permitted by section 23-911.

Each person so filing a petition for nomination shall pay or remit therewith the fee prescribed by law for the filing of such a petition for the particular judicial position for which he aspires for nomination. All such petitions for justices of the supreme court and judges of the several district courts of the state shall be filed with the secretary of state.

History: En. Sec. 3, Ch. 182, L. 1935; amd. Sec. 3, Ch. 229, L. 1961.

Collateral References

Elections 226 (1). 29 C.J.S. Elections §§ 91, 111, 131.

References

State ex rel. McHale v. Ayers, 111 M 1, 3, 105 P 2d 686.

23-2004. (812.4) Register of candidates for nomination. On receipt of each of such petitions the secretary of state shall make corresponding entries in the "Register of Candidates for Nomination" as now provided by law, but on a page or pages of such register apart from entries made with reference to the district candidates of political parties.

History: En. Sec. 4, Ch. 182, L. 1935.

23-2005. (812.5) Arrangement and certification of judicial candidates—separate from party designation. At the same time and in the same manner as by law he is required to arrange and certify the names of candidates for other state offices the secretary of state shall separately arrange and certify and file as required by law, the names of all candidates for judicial office, certifying to each county clerk of the state the names of all candidates for judicial office entitled to appear on the primary ballot in his county, with all other information required by law to appear upon the ballot, which certificate shall separately state the names of candidates for each respective numbered associate justice and department in districts having more than one (1) judge, and which lists of judicial candidates shall be made upon separate sheets of paper from the lists of candidates to appear under party or political headings.

History: En. Sec. 5, Ch. 182, L. 1935; amd. Sec. 4, Ch. 229, L. 1961.

Collateral References
Elections \$\infty 126 (5).
29 C.J.S. Elections \$ 118.

23-2006. (812.6) Primary ballots—preparation and distribution. At the same time and in the same manner as he is by law required to prepare the primary election ballots for the several political parties, the county clerk of each county shall arrange, prepare and distribute official primary ballots for judicial offices which shall be known and designated and entitled "Judicial Primary Ballots," which shall be arranged as are other primary ballots, except that the name of no political party shall appear thereon. The same number of official judicial primary ballots and sample ballots shall be furnished for each election precinct, as in the case of other primary election ballots.

History: En. Sec. 6, Ch. 182, L. 1935. References

State ex rel. McHale v. Ayers, 111 M 1, 4, 105 P 2d 686.

23-2007. (812.7) Judicial primary ballots—voting. Each elector having the right to vote at a primary election shall be furnished with a separate "Judicial Primary Ballot" at the same time and in the same manner as he or she is furnished with other ballots provided by law and each elector, without regard to political party, may mark such "Judicial Primary Ballot" for one or more persons of his choice for judicial nominations, depending on the number to be nominated and elected, which shall be deposited in the general ballot box provided. The official number of such judicial primary

ballot so delivered and voted shall correspond to the official number of the regular ballot of the elector. Every elector shall be entitled to vote, without regard to politics, for one or more persons of his choice for nomination for judicial office, depending on the number of places to be filled at the succeeding general election. Different terms of office for the same position shall be considered as separate offices.

History: En. Sec. 7, Ch. 182, L. 1935.

Electors May Write in Names of Candidates

The Nonpartisan Judiciary Act (23-2001 et seq.) does not restrict electors to the privilege of voting only for candidates whose names appear on the primary judicial ballot, but, though the act is silent as to their right to write in the name of a qualified person to judicial office, they

may do so under the act, in view of the provisions of sections 23-2002, 23-2006 and 23-2014, when construed in pari materia with the laws relating to primary and general elections (23-910 and 23-2009). State ex rel. McHale v. Ayers, 111 M 1, 3, 105 P 2d 686.

Collateral References

Elections \$\infty 126 (6). 29 C.J.S. Elections \$ 118.

23-2008. (812.8) Separate counting and canvassing of judicial ballots—application of general laws. After the closing of the polls at a primary election, the election officers shall separately count and canvass the judicial primary ballots and make record thereof, and certify to the same, showing the number of votes cast for each person upon the judicial primary ballot, in addition to certifying the party vote or other matters voted upon as required by law. Judicial ballots, their stubs, and unused ballots, shall be disposed of in the same manner as other ballots, stubs and unused ballots, and all returns made in the same manner now provided by law.

History: En. Sec. 8, Ch. 182, L. 1935.

Collateral References
Elections \$\infty\$ 126 (7).
29 C.J.S. Elections \\$ 119.

23-2009. (812.9) Nominations—placing names on ballots. The candidates for nomination at any primary election for any office within the provisions of this act, to be filled at the succeeding general election, equal in number to twice the number to be elected at the succeeding general election, who shall have received at any such primary election the highest number of votes cast for nomination to the office for which they are candidates (or if the number of all of the candidates voted for as aforesaid be not more than twice the number to be elected, then all the candidates) shall be the nominees for such office; and their names, and none other, except as hereinafter provided, shall be printed as candidates for such respective offices upon the official ballots which are provided according to law for use at such succeeding primary or general election; provided that no candidate shall be entitled to have his name placed on the judicial ballot at the general election, in any form, unless he shall have been a successful candidate at the primary election.

History: En. Sec. 9, Ch. 182, L. 1935.

References

State ex rel. McHale v. Ayers, 111 M 1, 4, 105 P 2d 686.

Collateral References
Elections©=172.
29 C.J.S. Elections § 161.

23-2010. (812.10) Tie vote, how decided. In case of a tie vote, candidates receiving tie vote for justice of the supreme court or judge of the

district courts shall appear and cast lots before the secretary of state on the fifth day after such vote is officially canvassed. In case any such candidate or candidates shall fail to appear either in person or by proxy in writing, before twelve o'clock noon of the day appointed, the secretary of state shall by lot determine the candidate whose name will be certified for the general election and printed on the official ballot.

History: En. Sec. 10, Ch. 182, L. 1935.

Collateral References Elections©=238. 29 C.J.S. Elections § 244.

(812.11) Vacancies among nominees after nomination and before general election, how filled. If after any primary election, and before the succeeding general election, any candidate nominated pursuant to the provisions of this act, shall die or by virtue of any present or future law become disqualified from or disentitled to have his name printed on the ballot for the election, a vacancy shall be deemed to exist which shall be filled by the otherwise unnominated and not disentitled candidate for the same office next in rank with respect to the number of votes received in such primary election. If after the primary, and before the general election, there should not be any candidate nominated and living and entitled to have his name printed on the ballot for any office which is within the provisions of this act, or not enough of such candidates to equal the number of persons to be elected to such office, then the governor in the case of justices of the supreme court and judges of the district courts is authorized and empowered to certify to the secretary of state the names of persons qualified for such office or offices equal in number to twice the number to be elected at the general election, and the names of the persons so nominated shall thereupon be printed on the official ballot in the same manner as though regularly nominated at the judicial primary election. Nominations so made by the governor to fill a vacancy shall not be deemed filed too late if filed within ten days after the vacancy occurs, and in case the ballots for the election have already been printed, stickers may be used to place the names of such candidates upon the ballot.

History: En. Sec. 11, Ch. 182, L. 1935.

23-2012. (812.13) Unlawful for political party to endorse judicial candidate. It shall be unlawful for any political party to endorse any candidate for the office of justice of the supreme court or judge of a district court, and anyone who in any way participates in such endorsement by any political party, or who purports to act on behalf of any political party in endorsing any candidate, shall be guilty of a misdemeanor.

History: En. Sec. 13, Ch. 182, L. 1935.

Collateral References Judges©3. 48 C.J.S. Judges § 12.

23-2013. (812.14) Repealed—Chapter 20, Laws of 1959.

Repeal

This section (Sec. 14, Ch. 182, L. 1935), relating to the arrangement of the judi
cial ballot when voting machines are used, was repealed by Sec. 3, Ch. 20, Laws 1959.

23-2014. (812.15) Repealing clause—application of general laws. All acts and parts of acts in conflict herewith are hereby repealed, and all laws

pertaining to elections, both primary and general, and to special elections. not in conflict herewith are hereby declared applicable to the nomination and election of the officers herein referred to.

History: En. Sec. 15, Ch. 182, L. 1935.

State ex rel. McHale v. Ayers, 111 M 1, 4, 105 P 2d 686.

CHAPTER 21

PRESIDENTIAL ELECTORS, HOW CHOSEN-DUTIES

23-2101. Electors, when chosen. 23-2102. Returns, how made. 23-2103. Duty of governor. Section 23-2101.

23-2104. Meeting of electors. Vacancies, how supplied. 23-2105. 23-2106. Voting of electors.

23-2107. Separate ballots for president and vice-president.

23-2108. Must make list of persons voted for.

23-2109. Result to be transmitted as provided by law of the United States.

23-2110. Compensation of electors. 23-2111. How audited and paid.

(813) Electors, when chosen. At the general election in November, preceding the time fixed by the law of the United States for the choice of president and vice-president of the United States, there must be elected as many electors of president and vice-president as this state is entitled to appoint. The names of the presidential electors shall appear on the ballot and in addition thereto, preceding them, shall appear the names of the presidential and vice-presidential candidates in their respective party designated columns. No square shall appear in front of the names of the presidential electors instead of which there shall be one square in front of the names of the presidential and vice-presidential candidates. The ballot shall also have the following direction printed thereon: "To vote for the presidential electors of any party, the voter shall place a cross in the square before the names of the candidates for president and vice-president of said party." The number of votes received by presidential and vice-presidential candidates shall, within the meaning of this act, be the number of votes to be credited to each of the electors representing them.

History: En. Sec. 1, p. 173, L. 1891; re-en. Sec. 1460, Pol. C. 1895; re-en. Sec. 626, Rev. C. 1907; re-en. Sec. 813, F. C. M. 1921; amd. Sec. 1, Ch. 4, L. 1933. Cal. Pol. C. Sec. 1307.

Collateral References United States 25. 91 C.J.S. United States § 28. 25 Am. Jur. 2d 700, Elections, § 9.

23-2102. (814) Returns, how made. The votes for electors of president and vice-president must be canvassed, certified to, and returned in the same manner as the votes for state officers.

History: En. Sec. 2, p. 173, L. 1891; re-en. Sec. 1461, Pol. C. 1895; re-en. Sec. 627, Rev. C. 1907; re-en. Sec. 814, R. C. M. 1921. Cal. Pol. C. Sec. 1308. Collateral References Elections@=247, 257, 265. 29 C.J.S. Elections §§ 229, 235, 240.

23-2103. (815) Duty of governor. The governor must transmit to each of the electors a certificate of election, and on or before the day of their meeting deliver to each of the electors a list of the names of electors, and must do all other things required of him in the premises by any act of Congress in force at the time.

History: En. Sec. 3, p. 174, L. 1891; reen. Sec. 1462, Pol. C. 1895; reen. Sec. 628, Rev. C. 1907; reen. Sec. 815, R. C. M. 1921, Cal. Pol. C. Sec. 1314.

Collateral References

Elections 265; United States 25.
29 C.J.S. Elections § 240; 91 C.J.S.
United States § 28.

23-2104. (816) Meeting of electors. The electors must assemble at the seat of government the first Monday after the second Wednesday in December next following their election, at two o'clock in the afternoon.

History: En. Sec. 4, p. 174, L. 1891; re-en. Sec. 1463, Pol. C. 1895; re-en. Sec. 629, Rev. C. 1907; re-en. Sec. 816, R. C. M. 1921; amd. Sec. 1, Ch. 15, L. 1933; amd. Sec. 1, Ch. 33, L. 1935. Cal. Pol. C. Sec. 1315.

Act Extending Time for Depositing Military Ballots Unconstitutional in Part

Since, under this section and the federal act (U.S.C., Tit. 3, sec. 5, enacted pursuant to section 1, article II of the federal constitution), the presidential electors must meet on the first Monday after the

second Wednesday in December following their election, the legislature could not, by enacting Ch. 101, Laws 1943 (since repealed), constitutionally extend the time for depositing military ballots for the general election for seven weeks beyond the Tuesday after the first Monday in November. Maddox v. Board of State Canvassers, 116 M 217, 224, 149 P 2d 112.

Collateral References United States 25. 91 C.J.S. United States § 28.

23-2105. (817) Vacancies, how supplied. In case of the death or absence of any elector chosen, or in case the number of electors from any cause be deficient, the electors then present must elect, from the citizens of the state, so many persons as will supply such deficiency.

History: En. Sec. 5, p. 174, L. 1891; 630, Rev. C. 1907; re-en. Sec. 817, R. C. M. re-en. Sec. 1464, Pol. C. 1895; re-en. Sec. 1921. Cal. Pol. C. Sec. 1316.

23-2106. (818) Voting of electors. The electors, when convened, must vote by ballot for one person for president and one for vice-president of the United States, one of whom at least is not an inhabitant of this state.

History: En. Sec. 1465, Pol. C. 1895; re-en. Sec. 631, Rev. C. 1907; re-en. Sec. 818, R. C. M. 1921. Cal. Pol. C. Sec. 1317.

23-2107. (819) Separate ballots for president and vice-president. They must name in their ballots the persons voted for as president, and in distinct ballots the persons voted for as vice-president.

History: En. Sec. 1466, Pol. C. 1895; re-en. Sec. 632, Rev. C. 1907; re-en. Sec. 819, R. C. M. 1921. Cal. Pol. C. Sec. 1318.

23-2108. (820) Must make list of persons voted for. They must make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes given for each.

History: En. Sec. 1467, Pol. C. 1895; rc-en. Sec. 633, Rev. C. 1907; re-en. Sec. 820, R. C. M. 1921. Cal. Pol. C. Sec. 1319.

23-2109. (821) Result to be transmitted as provided by law of the United States. They must certify, seal up, and transmit such lists in the manner prescribed by the constitution and laws of the United States.

History: En. Sec. 1468, Pol. C. 1895; re-en. Sec. 634, Rev. C. 1907; re-en. Sec. 821, R. C. M. 1921. Cal. Pol. C. Sec. 1320.

23-2110. (822) Compensation of electors. Electors receive the same pay and mileage as is allowed to members of the legislative assembly.

History: En. Sec. 7, p. 174, L. 1891; reen. Sec. 1469, Pol. C. 1895; re-en. Sec. 635, 1921. Cal. Pol. C. Sec. 1321.

23-2111. (823) How audited and paid. Their accounts therefor, certified by the secretary of the state, must be audited by the state auditor, who must draw his warrants for the same on the treasurer, payable out of the general fund.

History: En. Sec. 1470, Pol. C. 1895; re-en. Sec. 636, Rev. C. 1907; re-en. Sec. 823, R. C. M. 1921, Cal. Pol. C. Sec. 1322.

Collateral References States 126, 169. 81 C.J.S. States §§ 158, 194.

CHAPTER 22

MEMBERS OF CONGRESS-ELECTIONS AND VACANCIES

Section 23-2201. Election of United States senators—for full term and to fill vacancies. 23-2202. Writs of election to fill vacancy.

23-2203. When held.

23-2204. Returns, how made.

23-2205. Certificates issued by governor.

23-2206. Residence required for election or appointment to Congress.

23-2201. (824) Election of United States senators—for full term and to fill vacancies. The election of senators in Congress of the United States for full terms must be held on the first Tuesday after the first Monday in November next preceding the commencement of the term to be filled; and the elections of senators in Congress of the United States to fill vacancies therein must be held at the time of the next succeeding general state election following the occurrence of such vacancy; if any election therefor be invalid or not held at such time, then the same shall be held at the second succeeding general state election. Nominations of candidates and elections to the office shall be made in the same manner as is provided by law in case of governor.

History: En. Sec. 1480, Pol. C. 1895; re-en. Sec. 637, Rev. C. 1907; amd. Sec. 1, Ch. 126, L. 1915; amd. Sec. 1, Ch. 134, L. 1917; re-en. Sec. 824, R. C. M. 1921.

Collateral References United States 11. 91 C.J.S. United States § 11.

23-2202. (825) Writs of election to fill vacancy. When a vacancy happens in the office of one or more senators from the state of Montana in the Congress of the United States, the governor of this state shall issue, under the seal of the state, a writ or writs of election, to be held at the next succeeding general state election, to fill such vacancy or vacancies by vote of the electors of the state; provided, however, that the governor shall have power to make temporary appointments to fill such vacancy or vacancies until the electors shall have filled them.

History: En. Sec. 1481, Pol. C. 1895; References re-en. Sec. 638, Rev. C. 1907; amd. Sec. 2, Bottomly v. Ford, 117 M 160, 163, 157 Ch. 126, L. 1915; re-en. Sec. 825, R. C. M. P 2d 108.

23-2203. (826) When held. At the general election to be held in the year eighteen hundred and ninety-two, and at the general election every

two years thereafter, there must be elected for each congressional district one representative to the Congress of the United States.

History: En. Sec. 2, p. 306, L. 1891; re-en. Sec. 1490, Pol. C. 1895; re-en. Sec. 639, Rev. C. 1907; re-en. Sec. 826, R. C. M. 1921. Cal. Pol. C. Sec. 1343.

23-2204. (827) Returns, how made. The vote for representative in Congress must be canvassed, certified to, and transmitted in the same manner as the vote for state officers.

History: En. Sec. 2, p. 306, L. 1891; re-en. Sec. 1491, Pol. C. 1895; re-en. Sec. 640, Rev. C. 1907; re-en. Sec. 827, R. C. M. 1921. Cal. Pol. C. Sec. 1344.

Collateral References Elections 257, 265. 29 C.J.S. Elections §§ 235, 240.

23-2205. (828) Certificates issued by governor. The governor must, upon the receipt of the statement mentioned in section 23-1814, transmit to the person elected a certificate of his election, sealed with the great seal and attested by the secretary of the state.

History: En. Sec. 3, p. 306, L. 1891; 641, Rev. C. 1907; re-en. Sec. 828, R. C. M. re-en. Sec. 1492, Pol. C. 1895; re-en. Sec. 1921. Cal. Pol. C. Sec. 1347.

23-2206. Residence required for election or appointment to Congress. No person shall be elected or appointed to the office of senator or representative in the Congress of the United States who has not resided in this state at least one year prior to his election or appointment.

History: En. Sec. 1, Ch. 146, L. 1965.

CHAPTER 23

RECOUNT OF BALLOTS-RESULTS

Section 23-2301. Recount of votes, order for-application, contents and time for making-hearing-determination by court.

23-2302. Failure to comply with provisions for counting votes, presumption of incorrectness from.

23-2303. Calling in other judge—court not divested of jurisdiction by failure

to hear application within prescribed time. 23-2304. Precincts in which recount ordered—deposit of cost of recount—procedure when more than one application for recount made-manner

of recounting votes-certificates of election. Recount limited to precincts and offices specified in order of court. 23-2305.

23-2306. Certificates of election, effect of recount on.

23-2307. Election officers not to be paid until after recount—not paid on finding incorrect count.

23-2308. Other provisions concerning contests, reference to.

23-2309. Purpose of act-liberal construction.

23-2310. Application of act.

Close vote as ground for recount—petition filed with clerk of court or secretary of state. 23-2311.

23-2312. Tie vote as ground for recount. 23-2313. Total vote-manner of computation.

23-2314. County recount board-composition-disqualification of interested candidates.

23-2315. Clerk of county recount board.

23-2316. Notice to recount board of filing of petition-convening of board.

23-2317. Persons entitled to appear at recount—opening and recount of ballots. 23-2318. Certification of recount results-transmittal to secretary of statecorrected abstract of votes-new certificate of election or nomination.

23-2319. Reconvening state board of canvassers—recanvass by state board—corrected abstract of votes—new certificate of election or nomination.

23-2320. Effect of new certificate of election or nomination.

23-2321. Tie vote after recount. 23-2322. Expenses of recount.

23-2323. Supplemental to prior law.

23-2301. (828.1) Recount of votes, order for—application, contents and time for making—hearing—determination by court. Any unsuccessful candidate for any public office at any general or special election, or at any municipal election, may within five days after the canvass of the election returns by the board or body charged by law with the duty of canvassing such election returns, apply to the district court of the county in which said election is held, or to any judge thereof, for an order directed to such board to make a recount of the votes cast at such election, in any or all of the election precincts wherein the election was held, as hereinafter provided. Said application shall set forth the grounds for a recount, and it shall be verified by the applicant to the effect that the matters and things therein stated are true to the best of the applicant's knowledge, information and belief. Within five days after the filing of said application in the office of the clerk of said district court, the said court, or the judge thereof, shall hear and consider said application, and determine the sufficiency thereof: And, if from said verified application, the district court, or the judge thereof, finds that there is probable cause for believing that the judges and clerks of election did not correctly count and ascertain the number of votes cast for such applicant at any one or more of the election precincts that the judges and clerks of election might not have correctly counted and ascertained the number of votes cast for the applicant in any one or more election precincts, then, or in either of such events, the court or judge shall make an order addressed to the said board of county canvassers, requiring them at the time and place fixed by said order, which time shall be not more than five days from the making of such order to reassemble and reconvene as a canvassing board, and to recount the ballots cast at said election precinct or precincts of which complaint is made as in said order specified.

History: En. Sec. 1, Ch. 27, L. 1935.

Cross-References

Application of Montana Rules of Civil Procedure to recount proceedings, see M. R. Civ. P., Rule 81(a), Table A.

Salaries withheld pending contests, secs. 59-508, 59-509.

Constitutionality

Section 23-2301 et seq., held constitutional under section 23, article V as to sufficiency of title; section 27, article III as to due process of law, the holding of public office not being a property right, and the clause is satisfied when one is accorded the right to appear, be heard, file pleadings, make objections and participate fully in the hearing. State ex rel. Riley v. District Court, 103 M 576, 584, 586, 64 P 2d 115.

Applicable to Candidates for Senate and House

The election recount statutes, section 23-2301 et seq., apply to candidates for the state senate and house of representatives. State ex rel. Ainsworth v. District Court, 107 M 370, 372, 86 P 2d 5.

Courts Cannot Try Contests for Seats in Legislature, but May Hear Application for Recount

Section 9, article V of the constitution makes each house of the legislative assembly the judge of the elections, returns and qualifications of its members, and courts cannot try contests for seats in the legislature or decide issues involved in such contests, but mandamus lies to compel the court to perform the duty specially imposed upon it by the recount statutes, section 23-2301 et seq.; the election certif-

icate does not ensure acceptance of a candidate as a member of either house, but merely furnishes prima facie evidence that the majority of voters voted for him. State ex rel. Ainsworth v. District Court, 107 M 370, 376, 86 P 2d 5.

Direction by Court within Its Jurisdiction

The court could proceed in any suitable manner or mode most conformable "to the spirit" of the code (93-1106) in the absence of specific direction as to how proceedings shall be conducted, and was within its jurisdiction in directing canvassers' attention to sections of the codes covering points in dispute. State ex rel. Riley v. District Court, 103 M 576, 587, 64 P 2d 115. (But see State ex rel. Peterson v. District Court, 107 M 482, 488, 86 P 2d 403, below.)

Dismissal of Application for Noneligibility

District court committed error in dismissing the application for a recount under this section on the ground that applicant, convicted of a felony in federal court, lost his citizenship; such issue being properly triable in an election contest under the provisions of section 23-926 et seq., or section 94-1459 et seq. State ex rel. Stone v. District Court, 103 M 515, 519, 63 P 2d 147.

Functions of Court and Canvassing Board Divide

The law relating to proceedings for election recounts (23-2301 et seq.) specifically divides the functions of the court and the canvassing board. The court determines the grounds of and necessity for a recount and orders it done. The board is entrusted with the duty of making the recount, just as the judges and clerks of election are entrusted with the duty of making the count and certifying thereto in the first place. State ex rel. Peterson v. District Court, 107 M 482, 485, 86 P 2d 403.

Includes District Judge

Under this section, providing for the recount of votes by board of county canvassers, any unsuccessful candidate, including a candidate for the office of district judge, may apply to the district court for a recount. State ex rel. Riley v. District Court, 103 M 576, 580, 64 P 2d 115.

Liberal Construction Required

Sections 23-2301 to 23-2307 should be liberally construed. Where application for writ of supervisory control set forth that the votes were not correctly counted, such ground was sufficient to justify the court in finding that the votes "might not" have

been correctly counted, and writ accordingly issued directing respondents to order the recount. State ex rel. Thomas v. District Court, 116 M 510, 511, 154 P 2d 980.

Not Made in Presence of Court—Illegal Ballots

A recount of ballots under this act (23-2301 et seq.) is not made in the presence of the district judge ordering it; in acting, the board is not required to ask the advice of the judge as to whether ballots are or are not properly marked, and he may not give such advice; the board is in duty bound to "hear all, consider all, and then decide." State ex rel. Peterson v. District Court, 107 M 482, 486, 86 P 2d 403.

Not Remedy for Failure of Canvassing Board To Perform Duty Properly-Mandamus

Sections 23-2301 to 23-2307, providing for a recount of votes in one or more precincts alleged improperly counted, does not afford a legal remedy for an alleged wrongful canvass by a county canvassing board, and therefore does not defeat the right of a citizen to compel proper performance of their duty by writ of mandate. State ex rel. Lynch v. Batani, 103 M 353, 358, 62 P 2d 565.

Purpose of Recount Statute—Constitution

The sole purpose of the recount statutes, section 23-2301 et seq. is to determine, in a doubtful case, whether the official canvass of the vote was correct, and where the office of state senator or representative is concerned, the election certificate does not ensure one's acceptance as a member of either house, nor affect the ultimate right to the office, nor can the recount infringe upon the assembly's right to judge of the elections, returns and qualifications of its members in contravention of section 9, article V of the constitution. State ex rel. Ainsworth v. District Court, 107 M 370, 372, 86 P 2d 5.

Recount Proceeding Not an Election

A proceeding to obtain a recount of votes under section 23-2301 et seq. is in no sense of the word an election contest, it is absolutely independent of the law relating to contesting of elections and either or both remedies are available. State ex rel. Peterson v. District Court, 107 M 482, 484, 86 P 2d 403.

Statute In Pari Materia with Others

This section and sections 23-2302 to 23-2307 authorizing recount of votes, etc. and section 23-1812 et seq. relating to canvassers' abstract to secretary of state,

are in pari materia and must be construed together, both the county and state board of canvassers being governed by the latter provisions in case the result of the election is changed upon a recount. State ex rel. Riley v. District Court, 103 M 576, 583, 64 P 2d 115.

Successive Recounts

This statute provides that an unsuccessful candidate may within five days after canvass of the ballots petition for a recount; where an unsuccessful candidate for sheriff obtained a recount and was declared elected, and his opponent, the former successful but then unsuccessful candidate also asked for and was granted a recount, on application for a writ of supervisory control, the five-day limitation commenced to run from the time the board of canvassers announced the result of the first recount, and the application coming within that time, the court had jurisdiction to grant the second recount. State ex rel. Peterson v. District Court, 107 M 482, 485, 86 P 2d 403.

When Application Timely

Where the board was compelled by writ of mandate to reconvene by the supreme court and correct its findings with relation to two candidates for district judge, the application filed within five days after the corrected canvass was timely. State ex rel. Riley v. District Court, 103 M 576, 586, 64 P 2d 115.

When District and Supreme Courts May Not Control Actions of Boards

The rule that district courts may not advise boards of county canvassers on questions arising on a recount of ballots as to the legality or illegality of ballots cast, etc., applies also to the supreme court on application for extraordinary relief by way of writs, and it cannot control the actions of such boards indirectly by directions or suggestions to district courts. (If State ex rel. Riley v. District Court, 103 M 576, 64 P 2d 115, be open to a contrary construction it is to that extent overruled.) State ex rel. Peterson v. District Court, 107 M 482, 488, 86 P 2d 403.

References

State ex rel. Wulf v. McGrath, 111 M 96, 101, 106 P 2d 183.

Collateral References

Elections 260. 29 C.J.S. Elections § 237.

Costs or reimbursement for expenses incident to election contest. 106 ALR 928. Notice of election to fill vacancy in office at general election. 158 ALR 1184.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appeal from decision of election board. 61 ALR 2d 484.

Validity of write-in vote where candidate's surname only is written in on ballot. 86 ALR 2d 1025.

23-2302. (828.2) Failure to comply with provisions for counting votes, presumption of incorrectness from. If it shall be made to appear by such verified application that the judges or clerks of election in any one or more election precincts did not comply with each and all of the provisions and requirements of section 23-1705, in counting and ascertaining the number of votes cast for each person voted for at said election, that shall be considered as sufficient probable cause for believing that the judges and clerks of election of said election precinct, or precincts, did not correctly count and ascertain the number of votes cast for the applicant in such election precinct or precincts.

History: En. Sec. 2, Ch. 27, L. 1935.

23-2303. (828.3) Calling in other judge—court not divested of jurisdiction by failure to hear application within prescribed time. If the judge of said district court of the county in which said election is held be ill, or absent, or for any other reason disqualified from acting, then and in that event another district court judge shall be called in to hear and determine said application, either by an order of a judge of said district court, or by an order by a justice of the supreme court of the state of Montana. A failure to hear, consider or determine said application within the time herein provided, shall not divest the court of jurisdiction, but the said court before which said application is presented and filed shall retain jurisdiction there-

of for all purposes until said application is finally acted upon, considered and determined, and until a final count is made and had by the said board of county canvassers and the result thereof finally determined as herein provided.

History: En. Sec. 3, Ch. 27, L. 1935.

Extent of Jurisdiction of District Court
The jurisdiction of the district court
before which an application for a recount
of the votes is filed does not cease when
it orders the board to reconvene and recanvass the votes, but it retains jurisdiction of the proceeding until completion
of the canvass, i. e., until the court is advised thereof. State ex rel. Riley v. Dis-

trict Court, 103 M 576, 587, 588, 64 P 2d 115.

References

State ex rel. Peterson v. District Court, 107 M 482, 487, 86 P 2d 403.

Collateral References
Elections \$\infty 260.
29 C.J.S. Elections \{ 237.}

(828.4) Precincts in which recount ordered—deposit of cost of recount—procedure when more than one application for recount made manner of recounting votes—certificates of election. (1) If said application asks for a recount of the votes cast in more than one election precinct, but the grounds thereof are not sufficient for a recount in all, the court shall order a recount as to only such precinct as to which there are sufficient grounds stated and shown. The court in its order shall determine the probable expense of making such recount, and the applicant or applicants asking for such recount shall deposit with the said board the amount so determined and specified in said order, in cash: and if it be ascertained by said recount that the applicant or applicants have been elected to said office, then and in that event all money so deposited with said board shall be returned to the said applicant or applicants, but if an applicant as a result of said recount is found not to have been elected, then if the expense of making said recount shall be greater than the estimated cost thereof said applicants shall pay said excess, but if less than the estimated cost, then the difference shall be refunded to the applicant or applicants. The expense of making said recount as herein provided, shall be the salary of the members of the canvassing board for the period of time required to make such recount, and the salary of two clerks at the rate of not more than \$8.00 per day each.

- (2) If more than one candidate makes application for a recount of the votes cast at said election, the court may, in its discretion, consider such applications separately or together, and may make separate or joint orders in relation thereto, and apportion the expense between said applicants. The board of canvassers, in recounting said ballots cast in said election, shall count the votes cast in the respective precincts as to which a recount is ordered for the several candidates in whose behalf a recount is ordered, at the same time, in the following manner:
- (3) The county clerk shall produce, unopened, the sealed package or envelope received by him from the judges of election of the election precinct, or precincts, as to which a recount is ordered, in which is enclosed all ballots voted at such election in said precinct or precincts; and the package or envelope must then be opened by a member of the board of county canvassers in the presence and view of the other members of said board and of the county clerk, and of the candidates for said office or offices as to

which said recount is ordered, present thereat. The ballots must then be taken from said packages or envelope by a member of the board, and in the presence of the candidate or candidates seeking such recount, and the candidate or candidates who by the first canvass was found to have received the highest number of votes, the ballots must be taken singly by one of the members of the canvassing board, and the contents thereof, while exposed to the view of said candidates and of one of the other members of said canvassing board, must be distinctly read aloud, and as the ballots are read, two clerks must write at full length, on sheets to be known as tally sheets, which shall be previously prepared for that purpose, one for each clerk, with the name of said respective candidates and the office or offices as to which a recount is being made, with the numbers of such election precincts as to which said recount is ordered, and the number of votes for each person in said election precinct or precincts. At the completion of said recount the tally sheets must then be compared and their correctness ascertained, and the total number of votes cast for any candidate determined. If, on such recount, the votes cast for any candidate who makes such application shall be either more or less than the number of votes shown upon the official returns for that person and office, then the original returns shall be thereupon by the clerk of said board of canvassers, and under its direction, corrected so as to state the number of votes ascertained on such recount.

(4) The said board of canvassers shall thereupon cause its clerk to enter on the records of said board the result of said election as determined by such recount, and the clerk of said board shall thereupon make out and deliver certificate of election in conformity to the result ascertained by said recount.

(5) The candidate who as a result of the original or first canvass of the returns by the board of canvassers was found to be elected, shall be served with a copy of the application, and shall be given an opportunity to be heard thereon, and he shall be permitted to be present and to be repre-

sented at any recount ordered.

(6) When said recount of the ballots in any election precinct has been finished, the ballots shall then be again enclosed in the same package or envelope in which they had been placed by the judges of election, and in the presence and view of the county clerk and the members of the board of canvassers the said packages or envelopes shall again be closed and sealed, and then again delivered into the custody of the county clerk.

History: En. Sec. 4, Ch. 27, L. 1935.

23-2305. (828.5) Recount limited to precincts and offices specified in order of court. The board of canvassers shall make no recount of any votes cast in any election precinct or for any office other than the precinct or precincts and office or offices specified in said order.

History: En. Sec. 5, Ch. 27, L. 1935.

23-2306. (828.6) Certificates of election, effect of recount on. If it shall be found and determined by said recount that the person to whom the county clerk had issued a certificate of election pursuant to section 23-1808, did not in fact receive the highest number of votes cast at said election

for said office, then the said certificate of election first issued by said clerk shall be void, and the certificate of election issued by said clerk pursuant to the findings and determination of said recount shall be treated and considered, for all purposes as the only certificate of election to said office, and the person named therein shall be the person elected to said office.

History: En. Sec. 6, Ch. 27, L. 1935.

Collateral References
Elections©=267.
29 C.J.S. Elections § 240.

23-2307. (828.7) Election officers not to be paid until after recount—not paid on finding incorrect count. No judge or clerk of any election, of any election precinct, as to which a recount is ordered shall receive any pay for his or her services as such judge or clerk until the completion of such recount by the said canvassing board, and if it shall be ascertained on such recount that any applicant in whose behalf such recount is had, has been elected, then in that event, the judges and clerks of the election precincts in which the votes were found to have not been correctly counted shall not be paid or receive any pay for their services as such.

History: En. Sec. 7, Ch. 27, L. 1935.

Collateral References
Elections©=53.
29 C.J.S. Elections § 63.

23-2308. (829) Other provisions concerning contests, reference to. See sections 23-926 to 23-928 and sections 94-1464 to 94-1468 for other provisions governing election contests.

History: New section recommended by code commissioner, 1921.

23-2309. Purpose of act—liberal construction. It is the purpose of this act to procure a speedy and correct determination of the true and actual count of all ballots cast at an election, which ballots are valid on their face, and all provisions of this act shall be liberally construed to that end.

History: En. Sec. 1, Ch. 42, L. 1963.

23-2310. Application of act. The provisions herein shall apply to the recount of ballots cast in any election.

History: En. Sec. 2, Ch. 42, L. 1963.

- 23-2311. Close vote as ground for recount—petition filed with clerk of court or secretary of state. A recount shall be made under any of the following conditions:
- 1. When any candidate for any office, position, or nomination which is voted upon only by the electors of one county, or some part thereof, except the office of judge of the district court, is defeated according to the official returns by a margin not exceeding one-fourth of one per cent (¼ of 1%) of the total vote cast for all candidates for such office, position, or nomination, or is defeated by a margin not exceeding ten (10) votes, whichever is the greater, he may within five (5) days after completion of the official canvass of the returns file with the county clerk his duly verified petition stating he believes a recount will change the result and

praying for a recount of all votes cast for such office, position, or nomination.

- 2. Whenever any candidate for any office, position, or nomination which is voted upon in more than one county or for the office of judge of the district court, is defeated according to the official returns by a margin not exceeding one-fourth of one per cent (¼ of 1%) of the total vote cast for all candidates for such office, position, or nomination, he may within five (5) days after completion of the official canvass of the returns file a petition with the secretary of state such as set forth in subdivision one (1) of this section. The secretary of state shall immediately notify by registered mail each county clerk whose county includes any precincts which voted for such office, position, or nomination of the filing of such petition, and the recount shall be conducted as to all of such precincts in each such county.
- 3. Whenever any referred or submitted question is voted upon throughout the state and is determined according to the official canvass by a margin of not exceeding one-fourth of one per cent (¼ of 1%) of the total vote cast for and against on such question, there may be filed with the secretary of state within five (5) days after the completion of the official canvass, a petition signed by not less than one hundred (100) legally qualified electors of the state, and representing at least five (5) counties of the state, a petition with the secretary of state such as set forth in subdivision one (1) of this section. The secretary of state shall immediately notify by registered mail each county clerk of the filing of such petition, and the recount shall be conducted as to all precincts in each county.

History: En. Sec. 3, Ch. 42, L. 1963.

23-2312. Tie vote as ground for recount. When by reason of a tie vote found to exist upon the canvass of the original official returns, it is impossible to declare who has been elected or nominated to an office or position, it shall be the duty of the canvass board making such canvass to certify said vote to the county clerk where the election involved is confined to one county, except for the office of district judge, and to the secretary of state as to all other elections. The county clerk, or the secretary of state, as the case may be, shall proceed exactly as if a petition had been duly filed under this act, and the recount shall proceed accordingly. In case of a tie vote found to exist after the recount, such tie vote shall be resolved as provided by existing statutes.

History: En. Sec. 4, Ch. 42, L. 1963.

23-2313. Total vote—manner of computation. When in any election an elector may vote for two or more candidates for the same office, the total vote cast for all candidates for such office shall for the purposes of this act be the total vote actually cast for all candidates divided by the number of candidates officially declared nominated or elected as shown by the official returns.

History: En. Sec. 5, Ch. 42, L. 1963.

23-2314. County recount board—composition—disqualification of interested candidates. The county recount board of each county shall con-

sist of the three members of the board of county commissioners. If at the time and place appointed for the recount one or more of the county commissioners should not attend, the place of the absentees must be supplied by one or more of the following county officers, whose duty it is to act in the order named: the treasurer, the assessor, the sheriff, the clerk of court. The county recount board shall always consist of three acting members. If any member of the county recount board was among the candidates for an office, nomination, or position to which votes are to be recounted, he shall thereby be disqualified.

History: En. Sec. 6, Ch. 42, L. 1963.

23-2315. Clerk of county recount board. The county clerk shall be the clerk of the county recount board, and the board may hire additional clerks as needed.

History: En. Sec. 7, Ch. 42, L. 1963.

23-2316. Notice to recount board of filing of petition—convening of board. The county clerk shall immediately upon the filing with him of any petition for a recount, or upon receipt from the secretary of state of notice of such filing with the secretary of state, notify the members of the county recount board. The board shall then convene at the usual place of meeting of the county commissioners without undue delay, and in no event more than five (5) days after the filing of the petition with the county clerk or the notice of the filing with the secretary of state.

History: En. Sec. 8, Ch. 42, L. 1963.

23-2317. Persons entitled to appear at recount—opening and recount of ballots. Each candidate for any office, nomination, or position involved in a recount may appear, personally or by a representative, and shall have full opportunity to witness the opening of all ballot boxes and the count of all ballots. If the recount is upon a referred or submitted question, one legally qualified elector of the state favoring each side as to such question may be present and represent such side. The county clerk shall produce, unopened, the sealed package or envelope received by him from the judges of election of each election precinct in the county. The procedure for conducting the recount of votes shall be as provided in subsection three (3) of section 23-2304, and the recount shall proceed as expeditiously as reasonably possible until completed.

History: En. Sec. 9, Ch. 42, L. 1963.

23-2318. Certification of recount results—transmittal to secretary of state—corrected abstract of votes—new certificate of election or nomination. Immediately upon conclusion of the recount of all ballots to be recounted the county recount board shall certify the result. The certificate must be signed by at least two members of such board, attested under seal by the county clerk. The certificate shall set forth in substance the proceedings of the board and appearance of any candidates or representatives, shall adequately designate each precinct recounted, the vote of such precinct according to the official canvass thereof previously made as to the office, nomination, position, or question involved, and the correct vote of such precinct as determined by the board through the

recount. When the certificate relates to the recount ballots as to an office, nomination, position, or question voted upon in more than one county or for the office of judge of the district court, the certificate shall be made in duplicate, and either the original or duplicate original immediately transmitted to the secretary of state by registered mail. If the recount relates to the recount of ballots as to an office, nomination, position, or question voted upon in only one county, or some part thereof, the county recount board shall immediately recanvass the returns as corrected by the certificate showing the result of the recount, and make a new and corrected abstract of the votes cast. If such correct abstract shows no change in the result as previously found on the official returns, no further action shall be taken. If there is a change in the result, a new certificate of election or nomination shall be issued to each candidate found to have been elected or nominated.

History: En. Sec. 10, Ch. 42, L. 1963.

23-2319. Reconvening state board of canvassers—recanvass by state board—corrected abstract of votes—new certificate of election or nomination. Upon receipt by the secretary of state of certificates by all county recount boards required to be forwarded, the secretary of state shall file the same, and fix a time and place as early as reasonably possible for reconvening the state board of canvassers, and shall notify the members of the state board of canvassers thereof. The state board of canvassers shall reconvene at the time and place designated and recanvass the official returns as to such office, nomination, position or question, as corrected by such certificates, and shall make a new and corrected abstract of the votes cast. If such corrected abstract shows no change in the result previously found on the official returns, no further action shall be taken. If there is a change in the result, a new certificate of election or nomination shall be issued in the same manner as the certificate of election or nomination previously issued to each candidate found to have been elected or nominated.

History: En. Sec. 11, Ch. 42, L. 1963.

23-2320. Effect of new certificate of election or nomination. Any certificate of nomination or election issued under the provisions of this act shall have the effect of and shall be recognized as superseding and rendering null and void any certificate of election or nomination previously issued which is inconsistent with the new certificate, and the holder of any certificate of nomination or election issued under this act shall have the same identical rights as if he held the original certificate of nomination or election and no recount had been had.

History: En. Sec. 12, Ch. 42, L. 1963.

23-2321. Tie vote after recount. When a tie vote between candidates is found to exist on the basis of the recount, and by reason of such tie vote it cannot be determined who has been nominated or elected, the office or position shall be filled as provided by sections 23-1901 to 23-1904.

History: En. Sec. 13, Ch. 42, L. 1963.

23-2322. Expenses of recount. The expense of the recount of the votes as provided in this act shall be a county charge, except that any expenses of the secretary of state, and state board of canvassers shall be a state charge.

History: En. Sec. 14, Ch. 42, L. 1963.

23-2323. Supplemental to prior law. This act is supplemental to and not in derogation of the law relating to contest of elections, or the recount procedure set forth in sections 23-2301 to 23-2308.

History: En. Sec. 15, Ch. 42, L. 1963.

CHAPTER 24

CONVENTIONS TO RATIFY PROPOSED AMENDMENTS TO CONSTITUTION OF THE UNITED STATES

Section 23-2401. Convention for ratification of amendments to United States constitution.

23-2402. Delegates to constitutional convention.

23-2403. Nomination of delegates. 23-2404. Election of delegates.

23-2405. Form of ballot. 23-2406. Time for convention of delegates.

Quorum-officers-procedure-qualifications. 23-2407. 23-2408. Compensation of delegates and officers.

23-2409. Certificate of result—transmission to secretary of state of United States.

Qualification of signers of petitions and electors.

Federal acts to supersede state provisions concerning amendments. 23-2411.

23-2401. (829.1) Convention for ratification of amendments to United States constitution. Whenever the Congress shall propose an amendment to the constitution of the United States and shall propose that the same be ratified by convention in the states, a convention shall be held, as provided herein, for the purpose of ratifying such amendment.

History: En. Sec. 1, Ch. 188, L. 1933.

Collateral References Constitutional Law 10. 16 C.J.S. Constitutional Law § 6.

(829.2) Delegates to constitutional convention. The number of delegates to be chosen to such convention shall be not less than one-half of the number of the members of the legislative assembly of Montana, and each district shall have one-half of the number of delegates as it is then entitled to elect members of the legislative assembly of Montana, provided, that when the number is an odd number, each district shall be entitled to one-half of the next even number. The delegates shall be elected at the next general election or primary nominating election held throughout the state, after the Congress has proposed the amendment, or at a special election to be called by the governor, at his discretion, by proclamation at any time after the Congress has proposed the amendment, and except as otherwise provided herein, the election, in all respects, from the nomination of candidates to and including the certificate of election, shall be in accordance as nearly as may be with the laws of the state relating to the election of members of the legislative assembly of the state.

History: En. Sec. 2, Ch. 188, L. 1933; amd. Sec. 11, Ch. 194, L. 1967.

23-2403. (829.3) Nomination of delegates. Nomination of a candidate for the office of delegate shall be by petition, which shall be signed by not less than one hundred voters of the district. Nominations shall be without party or political designation, but shall be as "in favor of" or "opposed to" ratification of the proposed amendment. All petitions and the acceptances thereof shall be filed not less than thirty days prior to the election.

History: En. Sec. 3, Ch. 188, L. 1933; amd. Sec. 12, Ch. 194, L. 1967.

23-2404. (829.4) Election of delegates. The results of the election shall be determined as follows: The total number of votes cast for each candidate "in favor of" ratification, and the total number of votes cast for all candidates "in favor of" ratification and the total number of votes cast for each candidate "opposed to" ratification and the total number of votes cast for all candidates "opposed to" ratification shall be ascertained, and the candidates equal to the number to be elected receiving the highest number of votes from the side that casts the greater number of votes in favor of or opposed to ratification, as the case may be, shall be deemed elected.

History: En. Sec. 4, Ch. 188, L. 1933.

23-2405. (829.5) Form of ballot. On the official ballot there shall be printed the proposed amendment, the names of candidates for delegates to the convention, and appropriate instructions to the voters, all in substantially the following form:

PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Delegates to the Convention to Ratify the Proposed Amendment.

The Congress has proposed an amendment to the constitution of the United States which provides, (insert here the substance of the proposed amendment.)

The Congress has also proposed that the said amendment shall be ratified by conventions in the states.

In favor of	Opposed to					
ratification of the proposed amend-	ratification of the proposed amend-					
ment.	ment.					
Vote for	Vote for					
candidates only.	candidates only.					
Names of candidates.	Names of candidates.					

23-2406. (829.6) Time for convention of delegates. The delegates to the convention shall meet at the state capitol on the first Monday in the month following the election, at 10:00 o'clock a. m., and shall constitute a convention to act upon the proposed amendment to the constitution of the United States.

History: En. Sec. 6, Ch. 188, L. 1933.

23-2407. (829.7) Quorum — officers—procedure—qualifications. A majority of the total number of delegates to the convention shall constitute a quorum. The convention shall have power to choose a president and secretary, and all other necessary officers, and to make rules governing the procedure of the convention. It shall be the judge of the qualifications and election of its own members.

History: En. Sec. 7, Ch. 188, L. 1933.

23-2408. (829.8) Compensation of delegates and officers. Each delegate shall receive mileage and per diem as provided by law for members of the legislative assembly. The secretary and other officers shall receive such compensation as may be fixed by the convention.

History: En. Sec. 8, Ch. 188, L. 1933.

23-2409. (829.9) Certificate of result—transmission to secretary of state of United States. When the convention shall have agreed by a majority of the vote of the total number of delegates in attendance at such convention, a certificate to that effect shall be executed by the president and secretary of the convention, and transmitted to the secretary of state of the United States.

History: En. Sec. 9, Ch. 188, L. 1933.

23-2410. (829.10) Qualification of signers of petitions and electors. Those entitled to petition for the nomination of candidates and to vote at such election shall be determined as now provided by the registration laws of Montana.

History: En. Sec. 10, Ch. 188, L. 1933.

23-2411. (829.11) Federal acts to supersede state provisions concerning amendments. If the Congress shall either in the resolution submitting the proposed amendment, or by statute, prescribe the manner in which the convention shall be constituted, the preceding provisions of this act shall be inoperative, and the convention shall be constituted and held as the said resolution or act of Congress shall direct, and all officers of the state of Montana who may by said resolution or statute be authorized to direct, or be directed to take any action to constitute such a convention for this state, are hereby authorized and directed to act thereunder, and in obedience thereto, with the same force and effect as if acting under a statute of this state.

History: En. Sec. 11, Ch. 188, L. 1933.

CHAPTER 25

ELECTRONIC VOTING SYSTEMS

Section 23-2501. Purpose of act.

23-2502. Definition of terms.

23-2503. Use of electronic systems authorized—specifications—use at primaries -procedure.

23-2504. Voting booths-sample ballots-arrangement of ballot information -write-in ballots-preparation and testing of devices.

Closing of polls-counting of votes-sealing and preservation of bal-23-2505. lots-returns.

23-2506. Rules and regulations—specifications for devices and equipment.

23-2507. General election laws applicable.

23-2501. Purpose of act. The purpose of this act is to authorize the use of electronic voting systems in which the voter records his votes by means of marking or punching a ballot or one or more ballot cards, which are so designed that votes may be counted by data processing machines at one or more counting places.

History: En. Sec. 1, Ch. 20, L. 1965.

23-2502. Definition of terms. As used in this act, unless otherwise specified:

- "Automatic tabulating equipment" includes apparatus necessary to automatically examine and count votes as designated on ballots and data processing machines which can be used for counting ballots and tabulating results.
- (b) "Ballot card" means a ballot which is voted by the process of punching.
- "Ballot labels" means the cards, papers, booklet, pages or other materials containing the names of offices and candidates and statements of measures to be voted on
 - "Ballot" may include ballot cards, ballot labels and paper ballots.
- "Counting location" means a location selected by the county clerk and recorder or city clerk for the automatic processing or counting, or both, of ballots which may be in the same county or in another county.

(f) "Electronic voting system" means a system of casting votes by use of marking devices and tabulating ballots employing automatic tabulating equipment or data processing equipment.

(g) "Marking device" means either an apparatus in which ballots or ballot cards are inserted and used in connection with a punch apparatus for the piercing of ballots by the voter or any approved device for marking a paper ballot with ink or other substance which will enable the ballot to be tabulated by means of automatic tabulating equipment.

History: En. Sec. 2, Ch. 20, L. 1965;

Compiler's Note

amd, Sec. 1, Ch. 229, L. 1967.

Chapter 20, as enacted in 1965, contained no section "3."

23-2503. Use of electronic systems authorized—specifications—use at primaries—procedure. (a) Electronic voting systems may be used in elections, provided that such systems enable the voter to cast a vote in secrecy for all offices and all measures on which he is entitled to vote, and that the automatic tabulating equipment may be set to reject all votes for any office or measure when the number of votes therefor exceeds the number which the voter is entitled to east, or when the voter is not by law entitled to east a vote for the office or measure.

- (b) Electronic voting systems may be used at primary elections provided the voter can secretly select the party for which he wishes to vote, and the automatic tabulating equipment will count only votes for the candidates of one party, and will reject all votes for an office when the number of votes therefor exceeds the number which the voter is entitled to cast, and will reject all votes of a voter cast for candidates of more than one party.
- (c) So far as applicable, the procedure provided for voting paper ballots shall apply.
- (d) The governing body of any county, city or town may adopt, experiment with, or abandon any electronic voting system herein authorized and approved for use in the state, and may use such system in all or a part of the precincts within its boundaries, or in combination with paper ballots. It may enlarge, consolidate or alter the boundaries of the precincts where an electronic voting system is to be used.

History: En. Sec. 4, Ch. 20, L. 1965.

- 23-2504. Voting booths—sample ballots—arrangement of ballot information—write-in ballots—preparation and testing of devices. (a) In precincts where an electronic voting system is used, a sufficient number of voting booths shall be provided for the use of such systems, and the booths shall be arranged in the same manner as provided for use with paper ballots.
- (b) The officials charged with the duty of providing ballots, ballot cards or ballot labels for any polling place shall provide therefor sample ballots, ballot cards or ballot labels which shall be exact copies of the official ballots which are caused to be printed by them; said sample ballots shall be arranged in the form of a diagram showing the front of the marking device as it will appear after the ballots are arranged therein for voting on election day. Such sample ballots shall be posted by the election judges near the entrance of the voting booths and shall be there open to public inspection during the whole of election day.
- (c) The ballot information, whether placed on the ballot or on the marking device, shall, as far as practicable, be in the order of arrangement provided for paper ballots except that such information may be in vertical or horizontal rows, or on a number of separate pages. Ballots for all questions must be provided in the same manner and must be arranged on or in the marking device in the places provided for such purpose. Any voter who spoils his ballot or ballot card or makes an error may return it to the election board and secure another.
- (d) A separate write-in ballot, which may be in the form of a paper ballot, card or envelope in which the elector places his ballot card after voting shall be provided where necessary to permit electors to write in the names of persons whose names are not on the ballot.
- (e) The county clerk and recorder or city clerk shall cause the marking devices to be put in order, set, adjusted and made ready for voting when delivered to the election precincts. Before the opening of the polls

the election judges shall compare the ballots used in the marking device with the sample ballots furnished, and see that the names, numbers and letters thereon agree, and shall certify thereto on forms provided for this purpose. The certification shall be filed with the election returns.

(f) Within five days prior to the election day, the county clerk and recorder or city clerk shall have the automatic tabulating equipment tested to ascertain that the equipment will correctly count the votes cast for all offices and on all measures. Public notice of the time and place of the test shall be given at least forty-eight (48) hours prior thereto by publication once in one or more daily or weekly newspapers published in the county, city or town using such equipment, if a newspaper is published therein, otherwise in a newspaper of general circulation therein. The test shall be open to representatives of the political parties, candidates, the press and the public. The test shall be conducted by processing a preaudited group of ballots so punched or marked as to record a predetermined number of valid votes for each candidate and on each measure, and shall include for each office one or more ballots which have votes in excess of the number allowed by law in order to test the ability of the automatic tabulating equipment to reject such votes. If any error is detected, the cause therefor shall be ascertained and corrected and an errorless count shall be made before the automatic tabulating equipment is approved. The test shall be repeated immediately before the start of the official count of the ballots, in the same manner as set forth above. After the completion of the count, the programs used and ballots shall be sealed, retained and disposed of as provided for paper ballots.

History: En. Sec. 5, Ch. 20, L. 1965.

23-2505. Closing of polls—counting of votes—sealing and preservation of ballots—returns. (a) In precincts where an electronic voting system is used, as soon as the polls are closed, the election judges shall secure the marking devices against further voting. They shall thereafter open the ballot box and count the number of ballots or envelopes containing ballots that have been cast to determine that the number of ballots does not exceed the number of voters shown on the poll or registry lists. If there is an excess, this fact shall be reported in writing to the appropriate election officer in charge with the reasons therefor, if known. The total number of voters shall be entered on the tally sheets. The election judges shall thereupon count the write-in votes and prepare a return of such votes on forms provided for this purpose. If ballot cards are used, all ballots on which write-in votes have been recorded shall be serially numbered, starting with the number one, and the same number shall be placed on the ballot card of the voter. The inspectors or other appropriate precinct election officials shall compare the write-in votes with the votes cast on the ballot card and if the total number of votes for any office exceeds the number allowed by law, a notation to that effect shall be entered on the back of the ballot card and it shall be returned to the counting location in an envelope marked "defective ballots" and such invalid votes shall not be counted. So far as applicable, provisions relating to defective paper ballots shall apply.

- (b) The election judges shall place all ballots that have been cast in the container provided for that purpose, which shall be sealed and delivered forthwith by the election judges to the counting location or other designated place, together with the unused, void and defective ballots and returns.
- (c) All proceedings at the counting location shall be under the direction of the county clerk and recorder or city clerk under the observation of at least three election judges designated by the county commissioners, city council or commission and shall be open to the public, but no persons except those employed and authorized for the purpose shall touch any ballot, ballot container or return. If any ballot is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot in the presence of witnesses and substituted for the damaged ballot. Likewise, a duplicate ballot shall be made of a defective ballot which shall not include the invalid votes. All duplicate ballots shall be clearly labeled "duplicate," shall bear a serial number which shall be recorded on the damaged or defective ballot and shall be counted in lieu of the damaged or defective ballot.
- (d) The return printed by the automatic tabulating equipment, to which has been added the return of write-in and absentee votes, shall constitute the official return of each precinct or election district. Upon completion of the count the returns shall be open to the public.

History: En. Sec. 6, Ch. 20, L. 1965.

- 23-2506. Rules and regulations—specifications for devices and equipment. (a) The secretary of state may promulgate rules for the administration of this section, and shall approve the marking devices and automatic tabulating equipment used in electronic voting systems, provided, however, that the governing body of any county, city or town is authorized to adopt, experiment with or abandon any electronic voting system which has been used for at least two (2) successive elections in a state other than Montana without the approval of the secretary of state if the governing body of the county, city or town finds that the marking devices and automatic tabulating equipment proposed to be used fullfill the requirements of subsection (b).
- (b) No marking device or automatic tabulating equipment shall be approved unless it fulfills the following requirements:
 - (1) It shall permit and require voting in absolute secrecy.
- (2) It shall permit each elector to vote at any election for all persons and offices for whom and for which he is lawfully entitled to vote, and no others; to vote for as many persons for an office as he is entitled to vote for; to vote for or against any question upon which he is entitled to vote; and to vote, where applicable, for all candidates of one (1) party or to vote a split ticket as he desires.
- (3) It shall permit each elector, at presidential elections, by one (1) punch or mark to vote for the candidates of that party for presidential elector as a group.

(4) It shall comply with all other requirements of the election laws so far as they are applicable.

History: En. Sec. 7, Ch. 20, L. 1965; amd. Sec. 2, Ch. 220, L. 1967.

23-2507. General election laws applicable. All laws of this state applicable to elections where voting is done in another manner than by electronic voting systems and all penalties prescribed for violation of such laws, shall apply to elections and precincts where electronic voting systems are used, in so far as they are not in conflict with the provisions of this act.

History: En. Sec. 8, Ch. 20, L. 1965.

TITLE 24

ELECTRIC LINES CONSTRUCTION

Chapter 1. Regulation, construction of electric light, heat and power lines, 24-101 to 24-144.

CHAPTER 1

REGULATION, CONSTRUCTION OF ELECTRIC LIGHT, HEAT AND POWER LINES

Section 24-101. Overhead construction of light, heat and power lines. 24-102. Space between arms on poles or appliances for high and low voltage. 24-103.

Crossarms. 24-104. Bridge arms. 24-105. Double arms.

24-106. Guy attachments. Guy insulation. 24-107.

24-108. Guy clearance. 24-109. Arc lamps. 24-110. Wire insulation.

24-111. Trolley and "span" wires.

24-112. Foregoing provisions apply to current and voltage for light, heat and

24-113. Provisions not applicable, and when-climbing space.

24-114. Overhead line construction of telephone, telegraph and other signal wires-crossarms.

24-115. Climbing space. 24-116. Guy insulation.

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24-118. Poles or appliances used jointly for electric light, heat or power wires and telephones, telegraph or other signal wires.

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24-139. Interference with lines.

24-140. Repealing clause—exception.

24-141. Scope of act.

24-142. Regulation of electrical construction by rural electrification associations.

24-143. Adoption of national electrical safety code.

24-144. Violation of act a misdemeanor-penalty.

24-101. (2677) Overhead construction of light, heat and power lines. Any person, company, or corporation, except any rural electric co-operative corporations organized under chapter 5 of Title 14, owning or using any pole or appliance on which is run, placed, erected, or maintained in the state of Montana, any wire or cable used or to be used to conduct or carry electricity for the purpose of light, heat, or power, shall provide and maintain an unobstructed climbing space adjacent to any such pole or appliance, so that persons shall be able to ascend any such pole or appliance with reasonable safety and convenience up to and through the wires, connections, attachments, and structures of any such pole or appliance, and all cases where any "buck" or reverse arm is used, or where special construction is used, there shall be provided and maintained unobstructed climbing space of not less than thirty (30) inches square, omitting the area of any pole or appliance.

Where six (6) pin "buck" arms are used and all pins are occupied, they shall be ten (10) feet six (6) inches long and shall provide for sixty (60) inch pole pin spacing, fourteen (14) inch side spacing and five (5) inch end

pacing.

History: En. Sec. 1, Ch. 171, L. 1917; re-en. Sec. 2677, R. C. M. 1921; amd. Sec. 1, Ch. 137, L. 1941.

Cross-References

Highways, placing lines along, sec. 70-301.

Interference with or injury to electric lines, sec. 94-3203.

Rural electrification, sec. 14-501 et seq.

Collateral References

Electricity 9 et seq. 29 C.J.S. Electricity § 16.

24-102. (2678) Space between arms on poles or appliances for high and low voltage. At least one (1) standard pole-gain, or the equivalent of four (4) feet, shall be left vacant between the nearest crossarm on which is placed or maintained any wire or cable conducting or carrying more than seven hundred and fifty (750) volts of electricity, and any crossarm occupied by or used for wires or cables carrying seven hundred and fifty (750) volts or less, except that on all new construction and the rebuilding of present construction, the series street lighting wires may be placed on the outer pin positions of the secondary crossarm and shall be properly designated on the crossarm as the series street lighting circuit.

The said standard pole-gain shall be spaced not less than twenty-four (24) inches center to center, except that one (1) "buck" or reverse arm may be placed not less than twelve (12) inches below any crossarm; and provided that this section shall be held not to apply to bridge construction; and further provided, that it shall be held not to apply to primary taps to transformers on poles, and provided further, that all such primary taps leading to transformers on poles shall have insulation equivalent to the rated primary voltage of the transformer, except where transformers with cover mounted primary bushings and without primary fused cutouts are mounted within three (3) feet of the top of the pole on vertical type construction, bare or weatherproof wire may be used for primary taps to transformers.

History: En. Sec. 2, Ch. 171, L. 1917; re-en. Sec. 2678, R. C. M. 1921; amd. Sec. 2, Ch. 137, L. 1941; amd. Sec. 1, Ch. 45, L. 1949.

Collateral References

Liability for injury to or death of child from uninsulated electric wires while climbing tree. 27 ALR 2d 214;

24-103. (2679) Crossarms. All crossarms shall be made from clear, straight-grained wood, or standardized material. The cross-section of wood arms shall be not less than three and one-half $(3\frac{1}{2})$ by four and one-half $(4\frac{1}{2})$ inches. The pin spacing shall be, for six-pin arms, not less than thirty-inch (30") center for pole pin spacing, fourteen-inch (14") side spacing, and five-inch (5") end spacing; and four-pin arms not less than thirty-inch (30") center for pole pin spacing, fourteen-inch (14") side spacing and five-inch (5") end spacing. Where distribution voltages of between seven thousand five hundred (7,500) and fifteen thousand (15,000) volts are used, a climbing space of thirty (30) inches is permissible when the pole pins are occupied by the neutral and a phase wire.

History: En. Sec. 3, Ch. 171, L. 1917; re-en. Sec. 2679, R. C. M. 1921; amd. Sec. 3, Ch. 137, L. 1941.

24-104. (2680) Bridge arms. Bridge arms having the same pin spacing as the standard crossarm and a cross-section of not less than four by six inches may be installed in alleys or at alley and street intersections, wherever such construction may be proper, to provide the necessary clearance for fire escapes and other obstructions which may be overhanging the alley. All such structures shall be provided with idle arm, or span wire, for use of workmen.

History: En. Sec. 4, Ch. 171, L. 1917; re-en. Sec. 2680, R. C. M. 1921.

24-105. (2681) Double arms. Double arms, if of wood, shall be used at all line terminals where there is excessive strain, and on corners and curves where the departure from a straight line exceeds twenty (20) degrees. Line terminals of more than three (3) number six (6) copper wires, or the equivalent, shall be construed as excessive strain for one (1) arm. Line terminals and corners may be made on approved strain insulators or racks bolted directly to the pole in a vertical plane. All double arms must be blocked or bolted in accordance with standard practice.

History: En. Sec. 5, Ch. 171, L. 1917; re-en. Sec. 2681, R. C. M. 1921; amd. Sec. 4, Ch. 137, L. 1941.

24-106. (2682) Guy attachments. All overhead or horizontal guy wires, when attached to poles, stubs, or other ungrounded supports, shall be installed not less than eight (8) feet above the ground. Guy wires shall be attached to approved guy rods and anchors or to other grounded supports only when protected from kinks and abrasion.

History: En. Sec. 6, Ch. 171, L. 1917; re-en. Sec. 2682, R. C. M. 1921; amd. Sec. 5, Ch. 137, L. 1941.

24-107. (2683) Guy insulation. Any guy wire attached to any pole or appliance on which is run, placed, erected, or maintained any wire or

cable used to conduct or carry electricity for the purpose of light, heat, or power, or used jointly with telephone, telegraph, or other signal wires. shall be permanently and effectively insulated at all times, by the insertion of at least two (2) strain insulators. The upper of these insulators shall be inserted in the guy so as to be at least six (6) feet in a horizontal line from the pole itself, and the second strain insulator shall be inserted in the guy so as to be not less than eight (8) feet in a vertical line from the surface of the ground. In short guys in which the two (2) insulators are required, and which will be located at the same point or near each other, two (2) insulators may be coupled in series and put into the guy together. All strain insulators shall be so constructed and maintained that the guy wire or guy cable holding the insulator in place shall interlock in case of failure or breakage thereof. The above shall not apply to railway electrification, where at least one (1) insulator shall be inserted in each end of every auxiliary cross-span, and one in each auxiliary guy, and provided further, that in accord with the provisions of the national electric safety code, the above shall not apply to lines in rural areas where a common neutral is used and both primary and secondary circuits and also the guys are grounded to said common neutral and said common neutral has at least four (4) ground connections in each mile in addition to each ground connection at individual services.

History: En. Sec. 7, Ch. 171, L. 1917; re-en. Sec. 2683, R. C. M. 1921; amd. Sec. 6, Ch. 137, L. 1941; amd. Sec. 1, Ch. 248, L. 1947.

Collateral References

Faulty insulation of wires as rendering municipal corporations liable for injury or death occurring from defects in construction or maintenance of its electric street lighting equipment. 19 ALR 2d 359.

24-108. (2684) Guy clearance. Guy wires shall be attached to poles, so as to interfere as little as possible with workmen climbing or working thereon. Every guy wire which passes either over or under an electric light or power wire, other than those attached to the guyed pole, shall be so placed and maintained as to provide a clearance of not less than three feet between the guy and any electric wire.

History: En Sec. 8, Ch. 171, L. 1917; re-en. Sec. 2684, R. C. M. 1921.

24-109. (2685) Arc lamps. No arc lamp shall be erected or maintained in the state of Montana on any pole or appliance, unless such arc lamp be so constructed and maintained as to be lowered within nine (9) feet from the surface; provided, that this section shall not include arc lamps used for ornamental street lights attached to iron pedestals or any arc lamp attached to buildings, poles, or other structures which do not carry wire other than those feeding the lamp.

History: En. Sec. 9, Ch. 171, L. 1917; re-en. Sec. 2685, R. C. M. 1921; amd. Sec. 7, Ch. 137, L. 1941.

24-110. (2686) Wire insulation. The standard insulation, wherever insulation is used, for any wire or cable run, placed, or erected in any city or town in the state of Montana, and used to conduct or carry electricity for

light, heat, or power, for all voltage, shall have at least a triple-braided weatherproof cover.

History: En. Sec. 10, Ch. 171, L. 1917; re-en. Sec. 2686, R. C. M. 1921.

24-111. (2687) Trolley and "span" wires. Trolley wires must readily stand the strain put upon them when in use, and shall have a double insulation from the ground. In wooden-pole construction the pole shall be considered one insulation. In all cases where "span" wires are attached to grounded supports, or on buildings or other structures, there shall be provided and maintained at least two approved insulators in any such "span" wire between the trolley and any such other structures. The outer insulators shall be placed at a distance equal to that of the curb. Any "span" wire attached to buildings or other structures shall be stranded iron or steel wire, and shall readily stand the strain put upon them in use. None of the provisions of this section shall be held to apply where "feed" wires are used in place of "span" wires.

History: En. Sec. 11, Ch. 171, L. 1917; re-en. Sec. 2687, R. C. M. 1921.

Collateral References Street Railroads ≈ 36 et seq. 83 C.J.S. Street Railroads § 105.

24-112. (2688) Foregoing provisions apply to current and voltage for light, heat and power. All of the foregoing provisions of this act shall include current and voltage used for light, heat, or power, not to exceed fifteen thousand (15,000) volts of electricity between phase wires for distribution circuits.

History: En. Sec. 12, Ch. 171, L. 1917; re-en. Sec. 2688, R. C. M. 1921; amd. Sec. 8, Ch. 137, L. 1941.

24-113. (2689) Provisions not applicable, and when—climbing space. None of the provisions of sections 24-101 to 24-103, inclusive, of this code shall be held to apply to direct-current wire carrying nominally six hundred volts of electricity, and used for street railway purposes; provided, however, that an unobstructed climbing space not less than twenty-six inches in a horizontal line shall at all times be provided and maintained.

History: En. Sec. 13, Ch. 171, L. 1917; re-en. Sec. 2689, R. C. M. 1921.

24-114. (2690) Overhead line construction of telephone, telegraph and other signal wires—crossarms. All crossarms in overhead line construction of telephone, telegraph, and other signal wires shall be made from clear, straight-grained wood, or standardized material. In such construction, wood crossarms shall be used having a cross-section of not less than three and one-fourth (3½) by four and one-fourth (4½) inches, except where steel pins are used or where two-pin arms are used. For crossarms having six (6) or more pins the standard pin spacing shall be not less than sixteen (16) inches from center to center of pole pins.

History: En. Sec. 14, Ch. 171, L. 1917; re-en. Sec. 2690, R. C. M. 1921; amd. Sec. 9, Ch. 137, L. 1941. Liability of electric power or telephone company for injury or damage by lightning transmitted on wires, 25 ALR 2d 722.

Collateral References

Street Railroads©=36 et seq. 83 C.J.S. Street Railroads § 105 et seq. 24-115. (2691) Climbing space. Any person, company, or corporation owning or using any pole or appliance used exclusively for more than four (4) telephone, telegraph, or other signal wires, shall provide and maintain an unobstructed climbing space of not less than sixteen (16) inches.

Whenever "buck" or reverse arms are used, an unobstructed climbing space shall be left adjacent to the pole or appliance at least twenty (20) inches square, omitting the area of any such pole or appliance; any wire or cable attached to the pole in such buck-arm construction, not less than forty (40) inches from the nearest crossarm, shall be held not to be an obstruction to the climbing space as herein provided.

History: En. Sec. 15, Ch. 171, L. 1917; re-en. Sec. 2691, R. C. M. 1921; amd. Sec. 10, Ch. 137, L. 1941.

Collateral References
Telecommunications 101.
86 C.J.S. Telegraphs, Telephones, Radio

24-116. (2692) Guy insulation. In all cases where guy wires pass over, under, or between electric light, heat, or power wires, they shall be permanently and effectively insulated at all times by the insertion of at least two (2) strain insulators. The upper of these insulators shall be inserted in the guy so as to be at least six (6) feet in a horizontal direction from the pole itself, and the second strain insulator shall be inserted in the guy so as to be not less than eight (8) feet from the surface of the ground in a vertical line. In short guys in which the two (2) insulators herein required would be located at the same point, or near each other, two (2) insulators may be coupled in series and put into the guy together.

On poles used exclusively for telephone, telegraph, or other signal wires and cables, anchor guys for guying aerial cable leads shall be insulated from the messenger wires by being placed on separate shims, or a strain insulator shall be placed in the guy not less than eight (8) feet above the surface of the ground.

History: En. Sec. 16, Ch. 171, L. 1917; re-en. Sec. 2692, R. C. M. 1921; amd. Sec. 11, Ch. 137, L. 1941.

Collateral References

and Television § 35 et seq.

Street Railroads 36; Telecommunications 101.

83 C.J.S. Street Railroads § 105; 86 C.J.S. Telegraphs, Telephones, Radio and Television § 35.

24-117. (2693) "Aerial" cable supports. All "aerial" cables having two hundred pairs of number nineteen B & S gauge copper wires, or four hundred pairs of number twenty-two B & S gauge copper wires, shall be supported by through bolts at least five-eights inches in diameter; at all railroad and high-tension crossings, grades, curves, and corners, such cable shall be reinforced by a strap supported by a lag-screw or through bolts at least one-half inch in diameter, or other appliance of equal strength.

History: En. Sec. 17, Ch. 171, L. 1917; re-en. Sec. 2693, R. C. M. 1921.

24-118. (2694) Poles or appliances used jointly for electric light, heat or power wires and telephones, telegraph or other signal wires. A separation of at least four feet, measured at the pole, shall be provided and maintained between any telephone, telegraph, and other signal wires or

cables, and electric light, heat, or power wires, carrying not to exceed four hundred and forty volts; provided, that when the telephone, telegraph, or signal wires or cables are above the electric light, heat, or power wires carrying a voltage in excess of four hundred and forty volts, the clearance shall be eight feet. Telephone, telegraph, and other signal wires or cables shall preferably be run and maintained below electric light, heat, and power wires or cable. In no case shall telephone, telegraph, or other signal wires smaller than No. 12 N. B. S. gauge copper wire, or No. 12 B. W. G. iron wire be run or maintained as "lead" wires above electric light, heat, or power wires; provided, that this shall be held not to apply to telephone, telegraph, or signal wires used exclusively to maintain electric light, heat, and power line.

History: En. Sec. 18, Ch. 171 L. 1917; re-en. Sec. 2694, R. C. M. 1921.

24-119. (2695) Poles or appliances used jointly for electric light, heat, etc.—climbing space—crossarms. All telephone, telegraph, or other signal wires placed on poles jointly used for electric light, heat, and power wires, shall have an unobstructed climbing space of not less than twenty-six inches. All telephone, telegraph, or other signal wires placed on poles jointly used for light, heat, or power wires shall be placed and maintained on crossarms, except that brackets may be maintained on one side of the pole not nearer than two feet below the lowest crossarm, for the purpose of carrying duplex wires or cables to distribute telephone, telegraph, or signal wires.

History: En. Sec. 19, Ch. 171, L. 1917; re-en. Sec. 2695, R. C. M. 1921.

24-120. (2696) Guy insulation for joint construction. All joint construction for wires or cable of different and conflicting voltage, as outlined in the preceding section, shall be guyed in the same manner as specified for electric light, heat, and power construction.

History: En. Sec. 20, Ch. 171, L. 1917; re-en. Sec. 2696, R. C. M. 1921.

24-121. (2697) Two or more lines on same side of street—climbing space. In all cases where there are two or more pole lines used for telephone, telegraph, or other signal wires, on the same side of any street, alley, or public highway, provided such lines are not parallel on a horizontal plane, the crossarms shall have an unobstructed climbing space of not less than twenty-six inches.

History: En. Sec. 21, Ch. 171, L. 1917; re-en. Sec. 2697, R. C. M. 1921.

24-122. (2698) General construction for all wires and voltage. All poles shall be of the best quality cedar or other standardized material, except poles carrying one telephone circuit for rural or farmers' use. No pole shall be maintained which has not sufficient strength to safely sustain itself when supporting wires are removed.

History: En. Sec. 22, Ch. 171, L. 1917; re-en. Sec. 2698, R. C. M. 1921.

Collateral References

Liability of electric power company for personal injury or death from fall of pole. 97 ALR 2d 664. 24-123. (2699) Side arms. When necessary to avoid obstruction, a side or offset arm may be used. In all such cases a special arm of the same dimensions as the standard arm shall be used. This arm shall be bored for pins and bolts and installed with an angle-iron brace. Wherever a transformer is used on any such pole on which side arm construction is used, an idle arm shall be provided.

History: En. Sec. 23, Ch. 171, L. 1917; re-en. Sec. 2699, R. C. M. 1921.

24-124. (2700) Guy wire and anchor protection. Where guy wires installed on public highways are subject to mechanical injury, they shall be protected with a shield. This shield may consist of an iron pipe or a suitable wood shield, which may be clamped on the guy itself. The guy shield shall extend from the anchor rod up to a height of approximately seven feet.

History: En. Sec. 24, Ch. 171, L. 1917; re-en. Sec. 2700, R. C. M. 1921.

24-125. (2701) National electrical safety code — applies when. national electrical safety code standards shall govern all future construction where wires for power, heat, light, telephone, telegraph or signal cross each other, or cross railroad tracks. Hereafter all future electrical construction of overhead and underground electrical supply and communication lines in the state of Montana not provided for by the provisions of this chapter shall be in conformity with the rules and regulations set forth in the national electrical safety code approved by the American engineering standards committee as published by the department of commerce of the United States and any and all revisions thereof as the same may exist from time to time, provided that this section shall not be held to apply to interstate railroad electrification construction except where the wire or wires of the railroad cross or are crossed by wires belonging to others. Said safety code shall be interpreted and enforced by the railroad and public service commission of Montana as furnishing the standards of construction. This section shall not be held to conflict with any of the specific provisions of the Revised Codes of Montana as amended.

History: En. Sec. 25, Ch. 171, L. 1917; re-en. Sec. 2701, R. C. M. 1921; amd. Sec. 12, Ch. 137, L. 1941.

Collateral References

Liability of electric company to one

other than employee, arising from its failure to shut off current. 32 ALR 2d 244.
Liability for injury or death of adult from electric wires passing through or near trees. 40 ALR 2d 1299.

24-126. (2702) Protection of ground wires on poles. Any person, company, or corporation owning or using any poles for light, heat, or power wires, or poles used jointly for light, heat, or power wires, and telephone, telegraph and other signal wires, on which vertical ground wires are run, shall cause all such wires to be enclosed from the uppermost contact on the pole downward for a distance of five (5) feet below the lowest crossarm, or other wire supporting attachment used for light, heat or power wires and for a distance of eight (8) feet above the surface of the ground, in a casing equal in durability and insulating efficiency to a wooden casing not less than one and one-fourth (11/4) inches thick; provided however, that the

said casing may be omitted on poles supporting circuits carrying not more than four hundred forty (440) volts, and on poles in rural areas where a common grounded neutral is used. In all cases where ground wires are likely to be accidentally broken, mechanical protection should be provided. All metal casings shall be permanently and effectively grounded; provided, that this section shall not be held to apply to wires or cables which lead from overhead to underground systems, and further provided, that it shall not apply to high-tension lines of fifteen thousand (15,000) volts or more.

History: En. Sec. 26, Ch. 171, L. 1917; re-en. Sec. 2702, R. C. M. 1921; amd. Sec. 13, Ch. 137, L. 1941; amd. Sec. 2, Ch. 248, L. 1947; amd. Sec. 2, Ch. 45, L. 1949.

Compiler's Note

No mention of amendment by Ch. 248 of Laws 1947 was made in the title or amending clause of Ch. 45 of Laws 1949.

Collateral References

Liability for injury to or death of child from electric wires while elimbing tree. 27 ALR 2d 204.

Adult's intentional body contact with electrified wire as contributory negligence. 34 ALR 2d 98.

24-127. (2703) Generating and substation equipment, records and warnings. In every generating and substation used for light, heat, or power, there shall be kept a logbook or record showing the changes in the condition of operation, including the starting and stopping of electrical supply equipment, the name of each foreman or workman locally in charge of work, and all unusual occurrences and accidents.

The logbook or record shall be signed by the person in charge before being relieved. He shall keep within sight an operating diagram or equivalent device, indicating whether electrical supply circuits are open or closed, and where work is being performed. On circuits carrying normally in excess of seventy-five hundred volts, the operator in charge shall place "Men at Work" tags upon switches controlling any circuits upon which men are known to be working, and it shall be his duty to enforce the safety rules, and permit only authorized persons to approach the equipment or lines.

This section shall not apply to isolated plants, generating current for telegraph, telephone, and signaling purposes.

History: En. Sec. 27, Ch. 171, L. 1917; re-en. Sec. 2703, R. C. M. 1921.

Electric generating plant or transformer station as nuisance. 4 ALR 3d 361.

Collateral References

Electricity 14 (3). 29 C.J.S. Electricity § 40.

24-128. (2704) Protective devices. There shall be provided in conspicuous and suitable places in electrical stations and shops, a suitable and sufficient supply of first-aid and protective devices, all of approved kinds and qualities; the kinds and number of such devices will depend on the requirements of each case, as may be from time to time prescribed by the state industrial accident board, and it shall be the duty of the said state industrial accident board to prescribe such necessary protective devices. All such prescribed devices shall be kept, when not in use, in their regular location and in good working order.

History: En. Sec. 28, Ch. 171, L. 1917; re-en. Sec. 2704, R. C. M. 1921.

Collateral References Electricity©=14 (3). 29 C.J.S. Electricity § 40. 24-129. (2705) Air-gap and oil-break switches, where required—number of workmen employed—circuit-breaking devices. All circuits of four hundred and forty volts or more, where originating or terminating in any inclosure or building, or used for underground, shall be provided with air-gap switches or other approved devices; if any of the above circuits are of seven and one-half kilowatts or more capacity, they shall, in addition, be provided with an oil-break switch, or other approved device which will safely open the circuit under the load.

There shall be no less than two experienced electricians employed on any work or maintenance to be performed on any electrical wires or equipment connected therewith carrying nominally six hundred volts or more; provided, however, that this shall not apply to the operation of electrical equipment, nor in cases of emergency.

Direct-current feeders of two hundred and fifty volts or over shall be protected by approved circuit-breaking devices.

History: En. Sec. 29, Ch. 171, L. 1917; re-en. Sec. 2705, R. C. M. 1921.

24-130. (2706) Fuse requirements. All fuses shall be inclosed, or expulsion type, or other approved "national electrical code" standards.

History: En. Sec. 30, Ch. 171, L. 1917; re-en. Sec. 2706, R. C. M. 1921.

24-131. (2707) Safety measures—head room—guarding passages, manways, etc.—grounding of wires. Where necessary, all forms of electrical apparatus shall be effectively grounded for the protection of persons.

Wherever wires or conductors are installed within inclosures or buildings, in and about switchboards and other appliances where conductors are run, placed, or erected, a clear head room of six and one-half feet above the floor or surface must be maintained, or the wires be effectively guarded. All apparatus, passages, manways, and other places where persons may enter into, must be protected with efficient guards in accordance with standard practice; provided, this shall not be held to apply to electrical machinery and auxiliary devices carrying six hundred volts or less.

When lines or wires carrying seventy-five hundred volts or more are disconnected from their source of power, for work to be performed thereon, said lines or wires shall be effectively grounded for the protection of workmen.

History: En. Sec. 31, Ch. 171, L. 1917; re-en. Sec. 2707, R. C. M. 1921.

Violation as Negligence Per Se

Failure of defendant cash register company to provide adequate grounding on plug of a cash register machine on which plaintiff, a clerk at check-out stand in store, received an electric shock, consti-

tuted negligence per se, where defendant company was bound by contract to service its machines. Baumgartner v. National Cash Register Co., 146 M 346, 406 P 2d 686.

Collateral References
Electricity = 14 (2).
29 C.J.S. Electricity § 42.

24-132. (2708) Opening to outer air for manholes. The openings to outer air for any manhole used for light, heat, or power shall be circular in shape, and shall not be less than twenty-four inches in diameter.

The opening to outer air for any manhole used for telephone, telegraph, or other signal wires shall be circular in shape, and shall be not less than twenty inches in diameter.

Whenever persons are working in any manhole, whose opening to the outer air is less than three feet from the rail of any railway or streetcar track, a watchman or attendant shall be stationed on the surface at the entrance of such manhole at all times while work is being performed therein.

History: En. Sec. 32, Ch. 171, L. 1917; re-en, Sec. 2708, R. C. M. 1921.

24-133. (2709) Violation of act a misdemeanor—penalty. Every corporation or joint-stock company or individual, which shall violate any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars.

History: En. Sec. 33, Ch. 171, L. 1917; re-en. Sec. 2709, R. C. M. 1921.

Collateral References Electricity 21. 29 C.J.S. Electricity § 76.

24-134. (2710) **Date for act to take effect.** This act shall go into effect on the first day of May, 1917, from which time all new construction shall conform to the provisions hereof, and all betterments on existing plants and equipment shall be made to conform to the provisions of this act.

History: En. Sec. 34, Ch. 171, L. 1917; re-en. Sec. 2710, R. C. M. 1921.

24-135. (2711) Repealing clause. All acts or parts of acts, and all ordinances or parts of ordinances, of cities and towns in the state of Montana, in conflict with this act, are hereby repealed, and hereafter no ordinance in conflict with any provisions of this act shall be enacted or passed in any city or town in the state of Montana.

History: En. Sec. 35, Ch. 171, L. 1917; re-en. Sec. 2711, R. C. M. 1921.

24-136. (2711.1) Moving of structures—interference with electric wires. No person, firm or corporation moving, hauling or transporting any house, building, derrick or other structure shall cut, move, raise or in any manner interfere with an electric light or electric power wire or poles, or with telephone or telegraph wires, cables, messenger wires, guy wires, or poles, without giving notice to the owner or agent of said wires or poles, as hereinafter provided.

History: En. Sec. 1, Ch. 55, L. 1929; amd. Sec. 1, Ch. 174, L. 1937; amd. Sec. 14, Ch. 137, L. 1941.

Liability for injury by electric wires in street as affected by statute or other regulation affecting moving of building on highways. 83 ALR 2d 478.

Collateral References
Electricity 20.
29 C.J.S. Electricity § 74.

24-137. (2711.2) Notice, when and how given. The person, firm or corporation moving any house, building, derrick or other structure shall give to the person, firm or corporation owning or operating such wire or poles at their nearest office, and also at their principal office within the state, not less than three days' written notice of the time and place, when and where the removal of said poles or the cutting, raising, moving or otherwise interfering with said poles or wires will be necessary.

History: En. Sec. 2, Ch. 55, L. 1929.

24-138. (2711.3) Duties of the owner in such case. It shall then be the duty of any person, firm or corporation owning or operating said poles or wires after service of notice, as required by section 24-137, to furnish competent workmen or linemen to remove such poles, or raise or cut such wires as will be necessary to facilitate removing such house, building, derrick or other structure.

No person, firm or corporation engaged in moving any house, building, derrick or other structure shall raise, cut, or in any way interfere with any such poles or wires, unless the persons or authorities owning or having control of the same shall refuse so to do after having been notified, as required by section 24-137; then, only competent and experienced workmen or linemen shall be employed in such work, and in such case the necessary and reasonable expense shall be paid by the owners of the poles and wires handled, and the work shall be done in a careful and workmanlike manner, and the said poles and wires shall be promptly replaced and the damages thereto promptly repaired.

Provided, however, that any person, firm or corporation engaged in moving such structure within the limits of any city or town shall pay all necessary and reasonable expense of raising or cutting such wires or removing such poles.

History: En. Sec. 3, Ch. 55, L. 1929; amd. Sec. 1, Ch. 55, L. 1951.

24-139. (2711.4) Interference with lines. It shall be unlawful for any person, firm or corporation engaged as principal or employee in moving any house, building, derrick or other structure, as provided in the above sections, to move, touch, cut, molest or in any way interfere with any electric light, electric power, telephone or telegraph wires, cables, messenger wires, or guy wires, or any poles bearing any such wires, except in compliance with the provisions of this act.

History: En. Sec. 4, Ch. 55, L. 1929; amd. Sec. 2, Ch. 174, L. 1937; amd. Sec. 15, Ch. 137, L. 1941.

Cross-Reference

Interference with or injury to electric lines, penalty, sec. 94-3203.

Collateral References

Electricity 20. 29 C.J.S. Electricity §§ 74, 75.

Right of public utility not having an exclusive franchise to protection against, or damages for, interference with its operations, property, or plant by a competitor. 119 ALR 432.

Municipality's liability for damage by fall of trees or limbs on electric wires. 14 ALR 2d 210.

24-140. Repealing clause—exception. All acts and parts of acts in conflict herewith are hereby repealed but nothing herein contained shall be construed to repeal sections 24-142 to 24-144.

History: En. Sec. 16, Ch. 137, L. 1941.

24-141. Scope of act. Nothing in this act shall be construed as applying to any electrical construction of any person using such construction for power wires, where such construction and wires and the power plant furnishing electricity therefor are wholly owned by such person, and the electricity conducted thereby is produced and used solely by such person on his own premises, and not sold or delivered to any other person off

his premises, and where the wires or construction are not upon or do not cross any highway or public place, or the property of others, and where such wires carry less than two hundred fifty (250) volts of electricity.

History: En. Sec. 18, Ch. 137, L. 1941.

24-142. Regulation of electrical construction by rural electrification associations. From and after the passage of this act all electrical contruction conducted, and to be operated by any rural electrification association and constructed, and to be operated in pursuance of the authority of the rural electrification administration of the federal government, within the state of Montana shall be in conformity with the rules and regulations set forth in the national electrical safety code approved by the American engineering standards committee as published by the department of commerce of the United States and any and all revisions thereof as the same may exist from time to time; provided, however, that where Y-connected circuits with neutral conductors effectively grounded throughout their length are used, minimum vertical clearance of wires or neutral conductors over ground or rails shall be determined by the voltage between wires and ground, if such voltage does not exceed fifteen thousand (15,000) volts.

History: En. Sec. 1, Ch. 194, L. 1939; amd. Sec. 1, Ch. 139, L. 1951.

Collateral References
Electricity 14 (1).
29 C.J.S. Electricity 8 41.

24-143. Adoption of national electrical safety code. The provisions of the national electrical safety code, as designated in section 24-142, wherever the same may be in conflict with or in any manner contravene the provisions of this chapter, shall be deemed and construed as superseding, amending and modifying the provisions of this chapter in so far as the provisions thereof conflict with the provisions of the national electrical safety code; provided that the provisions of this section shall apply only to electrical construction conducted and operated in pursuance of the authority of the rural electrification administration of the federal government.

History: En. Sec. 2, Ch. 194, L. 1939.

Collateral References
Electricity©=14 (1).
29 C.J.S. Electricity § 41.

24-144. Violation of act a misdemeanor—penalty. Every person, firm or corporation which shall violate any provisions of this act shall be guilty of a misdemeanor.

History: En. Sec. 3, Ch. 194, L. 1939.

CORPORATE FILING FEES

(Sections 25-102 to 25-109, Revised Codes of Montana, 1947)

The amendment of section 25-102 and the repeal of sections 25-103 to 25-109 by Chapter 300, §§ 141, 143, Laws of 1967, are not effective until December 31, 1968.

These sections, relating to fees of the Secretary of State for corporate filings, are reprinted herein and should be retained for use with Replacement Volume Two, Part 2, until 1969.

- 25-102. (145) Fees of secretary of state. The secretary of state, for services performed in his office, must charge and collect the following fees:
- 1. For each copy of any law, resolution or record or other document or paper on file in his office, forty cents per folio, or, if the copy is made by any process of reproduction by photographic, photostatic or similar process, the fee shall be seventy-five cents per page or fraction thereof.
- 2. For affixing certificate and seal, two dollars, except that certificates of good standing and certificates of the secretary of state relative to the corporate character and capacity of a corporation pursuant to section 15-117 shall be five dollars each.
- 3. For issuing each certificate of incorporation and each certificate of increase of capital stock, three dollars.
- 4. For recording and filing each certificate of incorporation and each certificate of increase of capital stock, the following amounts shall be charged:

Amounts up to one hundred thousand dollars, one dollar per thousand dollars.

Additional from one hundred thousand dollars, to two hundred and fifty thousand dollars, eighty cents per thousand dollars.

Additional from two hundred fifty thousand dollars to five hundred thousand dollars, sixty cents per thousand dollars.

Additional from five hundred thousand dollars to one million dollars, forty cents per thousand dollars.

Additional over one million dollars, twenty cents per thousand dollars.

Providing, that no fee for filing any articles of incorporation or increase of capital stock shall be less than fifty dollars except those enumerated in the next subdivision, which do not have capital stock and are not organized for the purpose of profit.

Fees for an increase of capital stock shall be computed on the amount of increase at the same rate as for original incorporation for the amount of the increase.

5. For all services in connection with the issuance of certificate, filing and recording of each of the following, whether foreign or domestic, forty dollars, plus two dollars for certifying a copy of the articles so filed, when required for filing in the office of the county clerk: religious societies, churches, organizations for religious purposes, hospitals, lyceums, musical and scientific societies, libraries, benevolent and fraternal societies, social clubs, agricultural societies, stock growers' associations, grazing associ-

ations and other associations of like character, including local, independent and subordinate organizations, as well as state, supervisory, governing and grand organizations, and bodies of any such associations, societies or orders, or for the purpose of establishing public or private charities, or both. Provided, however, that the above enumerated organizations do not have capital stock and are not organized for the purpose of profit.

- 6. For issuing each certificate of decrease of capital stock, twenty dollars.
- 7. For recording and filing each certificate of decrease of capital stock, ten dollars.
- 8. For issuing each certificate of continuance of corporate existence, ten dollars.
- 9. For recording and filing each certificate of continuance of corporate existence, the following amounts shall be charged:

Amounts up to one hundred thousand dollars, fifty cents per thousand dollars.

Additional from one hundred thousand dollars to two hundred and fifty thousand dollars, forty cents per thousand dollars.

Additional from two hundred and fifty thousand dollars to five hundred thousand dollars, thirty cents per thousand dollars.

Additional from five hundred thousand dollars to one million dollars, twenty cents per thousand dollars.

Additional over one million dollars, ten cents per thousand dollars.

Providing, that no fee for filing any certificate of continuance of corporate existence shall be less than twenty-five dollars, except that corporations enumerated in subdivision five of this section shall pay only for the certificate of continuance provided in subdivision eight of this section, when extending their corporate existence for a term of years, or changing their corporate existence from a term of years, or continual or perpetual succession to perpetual existence.

- 10. For recording and filing each notice of removal of place of business, each certificate of change of name, or each certificate making capital stock assessable, ten dollars, and for issuing a certificate thereon, five dollars.
- 11. For filing each notice of appointment of agent, amendment to articles of incorporation, change of agent, change of principle [principal] place of business, or notice of withdrawal of a foreign corporation, five dollars.
- 12. For filing each annual statement or report of any foreign corporation, five dollars.
 - 13. For receiving and recording each official bond, ten dollars.
- 14. For each commission or other document, signed by the governor, and attested by the secretary of state (pardon and military commissions excepted), five dollars.
- 15. For filing the annual report required under section 15-811 by domestic corporations, three dollars.
- 16. For filing each trade mark, five dollars; for filing and recording each assignment of a trade mark, five dollars; and for issuing each certificate of record, five dollars.
- 17. For filing and recording miscellaneous papers, records, or other documents, five dollars.
 - 18. For filing and recording any other paper not otherwise herein

provided for, five dollars. When a copy of any law, resolution or record or other document or paper on file in the office of the secretary of state is presented for comparison and certification, ten cents per folio must be charged and collected for proofreading the same. That no member of the legislative assembly, or state or county officer, can be charged for any search relative to matters appertaining to the duties of his office; nor must he be charged any fee for a certified copy of any law or resolution passed by the legislative assembly relative to his official duties. Fees must be collected in advance, and when collected by the secretary of state, must be paid to the state treasurer at the end of each quarter, as provided in the constitution.

19. For filing and recording a certificate or decree of dissolution, five dollars.

History: Ap. p. Sec. 410, Pol. C. 1895; amd. Sec. 1, p. 47, L. 1899; amd. Sec. 1, Ch. 127, L. 1903; amd. Sec. 1, Ch. 74, L. 1905; re-en. Sec. 165, Rev. C. 1907; amd.

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Sec. 1, Ch. 91, L. 1921; re-en. Sec. 145, R. C. M. 1921; amd. Sec. 1, Ch. 50, L. 1935; amd. Sec. 1, Ch. 116, L. 1961. Cal. Pol. C. Sec. 416.

1. 6. 6.

25-103. (145.1) Fee for filing articles of incorporation of foreign corporations. That every foreign corporation required by law to file in the office of the secretary of state a certified copy of its charter or articles of incorporation shall pay to the secretary of state for the filing thereof as follows:

Upon the proportion of its capital stock then or thereafter to be represented by its property and business in Montana at the rate of one dollar (\$1.00) per thousand dollars (\$1,000.00) for the first one hundred thousand dollars (\$100,000.00); at the rate of eighty cents (80c) per thousand dollars (\$1,000.00) for any additional from one hundred thousand dollars (\$100,000.00) to two hundred fifty thousand dollars (\$250,000.00); at the rate of sixty cents (60c) per thousand dollars (\$1,000.00) for any additional from two hundred fifty thousand dollars (\$250,000.00) to five hundred thousand dollars (\$500,000.00); at the rate of forty cents (40c) per thousand dollars (\$1,000.00) for any additional from five hundred thousand dollars (\$500,000.00) to one million dollars (\$1,000,000.00); and at the rate of twenty cents (20c) per thousand dollars (\$1,000,000.00) for any additional over one million dollars (\$1,000,000.00), provided, however, that no fee for filing shall be less than fifty dollars (\$50.00).

History: En. Sec. 1, Ch. 169, L. 1931.

25-104. (145.2) Report of capital stock and assets. Every foreign corporation which is required by law to file in the office of the secretary of state a certified copy of its charter or articles of incorporation shall annually and between the first days of January and March of each year file in said office a report verified by the oath of its president, vice-president, or secretary, stating the proportion of its capital stock represented in the state of Montana by its property located and business transacted therein during the preceding year.

History: En. Sec. 2, Ch. 169, L. 1931.

25-105. (145.3) Determination of proportion of capital stock employed in state. In determining the proportion of capital stock employed in this state the same shall be computed by taking the gross business in dollars of the corporation in the state for the preceding year and adding the same to the full value in dollars of the property of the corporation located in the state and by taking the total gross business in dollars of the corporation,

both within and without the state for the preceding year, and adding thereto the full value in dollars of the entire property of the corporation both
within and without the state and by then dividing the total value in dollars
of the business and property in the state by the total value in dollars of all
the business and property of the corporation, the quotient thus obtained
to be taken as the percentage of the capital stock represented by the business and property within the state. The secretary of state may demand as
a condition to the filing of such report a statement verified by the president, vice-president or secretary of such foreign corporation, showing in
detail the information required for the making of the calculation aforesaid, which statement when so demanded shall be attached to and filed
with such report.

History: En. Sec. 3, Ch. 169, L. 1931.

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25-106. (145.4) Additional filing fee required on showing of report, when. Whenever such report shall show a greater proportion of the capital stock of such foreign corporation represented by its property and business in Montana than that upon which the fee for filing the charter or articles of incorporation was based, such foreign corporation at the time of filing such report, shall pay such additional fee as it would have been required to pay for filing if such fee had been calculated on the basis of the proportion of the capital stock represented by its business and property in Montana as shown by such report.

History: En. Sec. 4, Ch. 169, L. 1931.

25-107. (145.5) Figuring fee on corporation having stock of no par value. If a foreign corporation has capital stock of no par value, the value of its shares, for the purpose of determining the amount of fees to be paid hereunder, shall be determined upon the clear present market value of said shares; provided, however, that if the clear present market value of said shares is not readily ascertainable, then the shares shall be considered to be of the value as shown by the books of account of the corporation.

History: En. Sec. 5, Ch. 169, L. 1931.

25-108. (145.6) Forfeiture of right to do business for failure to pay fee or file statement. If any foreign corporation shall fail to file such annual report, or to pay such additional fee or shall file a false report, it shall forfeit its right to do business in this state.

History: En. Sec. 6, Ch. 169, L. 1931.

25-109. (145.7) **Application of act.** The provisions of this act shall not apply to corporations which entered Montana for the transaction of business prior to February 27, 1915.

History: En. Sec. 7-A, Ch. 169, L. 1931.

TITLE 25

FEES AND SALARIES

- Chapter 1. Fees of state officers, 25-101 to 25-113. 2. Fees of county officers, 25-201 to 25-237.

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Fees of county oncers, 25-201 to 25-257.
 Fees and salaries of justices of the peace and constables, 25-301 to 25-309.
 Jurors' and witnesses' fees, 25-401 to 25-414.
 Salaries of state officers, deputies and employees, 25-501 to 25-509.
 Salaries of county officers, deputies and employees, 25-601 to 25-611.1.

CHAPTER 1

FEES OF STATE OFFICERS

Section 25-101. Repealed.

Fees of secretary of state. 25-102.

25-103 to 25-109. Repealed.

25-110. Water users' association exempt from payment of fees.

25-111. Fees of clerk of supreme court.

25-112. Fees of notaries public.25-113. Fees of commissioner of deeds.

25-101. (4912) Repealed—Chapter 286, Laws of 1959.

Repeal

and state auditor principally on insurance This section (Sec. 4630, Pol. C. 1895), matters, was repealed by Sec. 673, Ch. 286, relating to the fees of secretary of state Laws 1959.

- 25-102. (145) Fees of secretary of state. The secretary of state, for services performed in his office, must charge and collect the following fees:
- 1. For each copy of any law, resolution or record or other document or paper on file in his office, except corporate papers, forty cents (\$.40) per folio, or, if the copy is made by any process of reproduction by photographic, photostatic or similar process, the fee shall be seventy-five (\$.75) cents per page or fraction thereof.

2. For affixing certificate and seal, two dollars (\$2).

- 3. For receiving and recording each official bond, ten dollars (\$10).
- 4. For each commission or other document, signed by the governor, and attested by the secretary of state (pardon and military commissions excepted), five dollars (\$5).

5. For filing each trade-mark, five dollars (\$5); for filing and recording each assignment of a trade-mark, five dollars (\$5); and for issuing each certificate of record, five dollars (\$5).

6. For filing and recording miscellaneous papers, records, or other

documents, five dollars (\$5).

7. For filing and recording any other paper not otherwise herein provided for, five dollars (\$5). When a copy of any law, resolution or record or other document or paper on file in the office of the secretary of state is presented for comparison and certification, ten cents (\$.10) per folio must be charged and collected for proofreading the same. That no member of

the legislative assembly, or state or county officer, can be charged for any search relative to matters appertaining to the duties of his office; nor must he be charged any fee for a certified copy of any law or resolution passed by the legislative assembly relative to his official duties. Fees must be collected in advance, and when collected by the secretary of state, must be paid to the state treasurer at the end of each quarter, as provided in the constitution.

History: Ap. p. Sec. 410, Pol. C. 1895; amd. Sec. 1, p. 47, L. 1899; amd. Sec. 1, Ch. 127, L. 1903; amd. Sec. 1, Ch. 74, L. 1905; re-en. Sec. 165, Rev. C. 1907; amd. Sec. 1, Ch. 91, L. 1921; re-en. Sec. 145, R. C. M. 1921; amd. Sec. 1, Ch. 50, L. 1935; amd. Sec. 1, Ch. 116, L. 1961; amd. Sec. 141, Ch. 300, L. 1967. Cal. Pol. C. Sec. 416.

NOTE.—It is impossible to assemble in a single title all the laws on a subject like fees and salaries, since they are frequently found in sections which relate to other matters. Therefore the salaries and fees of officers will often be found in the law pertaining to a particular office.

References

State ex rel. Aachen & Munich Fire Ins. Co. v. Rotwitt, 17 M 41, 43, 41 P 1004; State ex rel. Travelers' Ins. Co. v. Rotwitt, 18 M 87, 89, 44 P 409; State ex rel. Cascade Bank v. Yoder, 39 M 202, 208, 103 P 499; Wells Fargo & Co. v. Harrington, 54 M 235, 244, 169 P 463; Great Western Sugar Co. v. Mitchell, 119 M 328, 174 P 2d 817; Atlantic Refining Co. v. Virginia, 302 U S 22, 29, 82 L Ed 24, 58 S Ct 75.

Collateral References States 58. 81 C.J.S. States § 89.

DECISIONS UNDER FORMER LAW

Changing Capital Stock from Par Value to Nonpar Value

In the absence of provision of law authorizing the organization of corporations in this state with capital stock of nonpar value, and in view of this section, prior to 1935 amendment, which requires the secretary of state to collect a fee for filing incorporation papers based upon the amount of its authorized capital stock, a writ of mandate to compel him to file a proposed amendment of the articles of incorporation of a domestic corporation changing its capital stock from a par value of \$1.00 to shares without a par value does not lie. Barnett Iron Works, Inc. v. Harmon, 87 M 38, 42, 285 P 191.

Increase of Capital Stock

The fact that the trustees of a corporation may have increased the capital stock of the company immediately after its incorporation for the purpose of evading the provisions of this section, prior to 1899 amendment authorizing a fee of fifty cents on each one thousand dollars of the capital stock, upon the filing of the certificate of incorporation, does not warrant the secretary of state in refusing to file such certificate of increase. State ex rel. Home Building & Loan Assn. of Helena v. Rotwitt, 17 M 537, 539, 43 P 922.

Where each of two foreign corporations, upon entering the state to transact business, had paid the full legal fees for filing its articles of incorporation, and subsequently the former absorbed the latter and increased its capital stock, the certificate presented to the secretary of

state showing an increase of capital stock, the secretary was not required to deduct the amount of the capital stock of the absorbed corporation, upon which the fees have once been paid, from the amount shown by the certificate of increase, but properly charged a fee based upon the difference between its former capitalization and the present one. United Missouri River Power Co. v. Yoder, 41 M 245, 248, 108 P 912.

License Tax

The fee demanded by this section prior to 1921 amendment is not a property tax; it is graduated according to the par value of the company's capital stock, without reference to the full cash value of the property owned by the corporation; and it does not become a lien upon any property which the corporation may have in the state, as does a property tax under section 84-3807. State ex rel. General Electric Co. v. Alderson, 49 M 29, 32, 33, 140 P 82.

The fee fixed by this section, based on the amount of capital stock, for the recording and filing of certificates of incorporation in the office of the secretary of state, is not a property tax but a license tax exacted of every corporation, domestic as well as foreign, engaged in intrastate business, for the privilege of doing business within the state, enjoying the protection of its laws, and the pecuniary advantages afforded by its markets. State ex rel. General Electric Co. v. Alderson, 49 M 29, 32, 33, 140 P 82, explained in 60 M 380, 383, 387, 199 P 909.

25-103 to 25-109. (145.1 to 145.7) Repealed—Chapter 300, Laws of 1967.

Repeal

These sections (Secs. 1 to 6, 7A, Ch. 169, L. 1931), relating to fees for filing of cor-

porate reports, were repealed by Sec. 143, Ch. 300, Laws 1967, effective December 31, 1968.

25-110. (147) Water users' association exempt from payment of fees. Any water users' association, organized in conformity with the requirements of the laws of the United States and of the state of Montana, under the Reclamation Act of June 17, 1902, which, under the articles of incorporation, is authorized to furnish water only to its stockholders, shall be exempt from the payment of any incorporation tax and from the payment of any annual franchise tax, and upon filing its articles of incorporation with the secretary of state, shall be required to pay only a fee of forty dollars (\$40.00) for the filing and recording of such articles of incorporation, and the issuance of certificate of incorporation.

History: En. Sec. 1, Ch. 66, L. 1905; re-en. Sec. 167, Rev. C. 1907; re-en. Sec. 147, R. C. M. 1921; amd. Sec. 9, Ch. 117, L. 1961.

referred to in this section, is compiled in the United States Code as Tit. 43, sec. 372 et seq.

Compiler's Note

The Reclamation Act of June 17, 1902,

Collateral References

Waters and Water Courses © 238. 94 C.J.S. Waters § 345.

25-111. (4913) **Fees of clerk of supreme court.** The fees of the clerk of the supreme court are specified in section 82-503 of this code, and salary in section 82-506.

History: En. Sec. 4631, Pol. C. 1895; re-en. Sec. 3164, Rev. C. 1907; re-en. Sec. 4913, R. C. M. 1921.

tion, was repealed by Sec. 4, Ch. 182, Laws 1949.

Compiler's Note

Section 82-506, referred to in this sec-

Collateral References

Clerks of Courts € 11 et seq. 14 C.J.S. Clerks of Courts § 9 et seq.

25-112. (4914) Fees of notaries public. For drawing, copying, and recording each and every protest for the nonpayment of a promissory note, or for the nonpayment or nonacceptance of a bill of exchange, order, draft, or check, one dollar.

For drawing and serving every notice of nonpayment of a promissory note, or of the nonpayment or nonacceptance of a bill of exchange, order, draft, or check, twenty-five cents.

For drawing an affidavit, deposition, or other paper for which provision is not herein made, for each folio, unless otherwise prescribed, twenty cents.

For taking an acknowledgment or proof of a deed or other instrument, to include the seal and the writing of the certificate, for the first signature, one dollar.

For each additional signature, fifty cents.

For administering an oath or affirmation, twenty-five cents.

For certifying an affidavit, with or without seal, including oath, fifty cents.

Provided, the maximum fee that can be computed or charged for drawing, copying, and recording a protest, and for drawing and serving the notices of nonpayment or nonacceptance, shall be two dollars and fifty cents.

History: En. Sec. 1, Ch. 44, L. 1907; Sec. 3165, Rev. C. 1907; re-en. Sec. 4914, R. C. M. 1921.

Depositions

A notary public who, in taking depositions, made use of a stenographer employed for that purpose by the party at whose instance they were being taken, and who merely swore the witnesses and attached his certificate to each deposition,

was entitled only to the fees prescribed by statute for attaching his certificate and administering the oaths, and not to the additional sum of twenty cents per folio for transcribing the testimony allowed by this section. Coleman v. Northern Pacific Ry. Co., 41 M 123, 125, 108 P 582.

Collateral References

Notaries 3. 66 C.J.S. Notaries § 14.

25-113. (4915) Fees of commissioner of deeds. The fees of commissioner of deeds are the same as those prescribed for a notary public.

History: En. Sec. 4633, Pol. C. 1895; re-en. Sec. 3166, Rev. C. 1907; re-en. Sec. 4915, R. C. M. 1921.

Collateral References
Registers of Deeds 3.
76 C.J.S. Registers of Deeds 13.

CHAPTER 2

FEES OF COUNTY OFFICERS

- Section 25-201. Disposal of fees collected by county officers. 25-202. What officers to receive fees for their own use. 25-203. Fees must be paid into county treasury, when. 25-204. Statement and affidavit of fees collected. 25-205. Treasurer to file affidavits and statements. 25-206. Payment of salary not to be made until statement and report filed. Board not to allow compensation of deputies until affidavit filed. 25-207. 25-208. Fees must be paid in advance. 25-209. No fees to be charged state, county or public officer. 25-210. Fees for naturalization. 25-211. Officer must give itemized receipt. 25-212. Must keep statement posted in his office. 25-213. Officer must not receive any other fees than those named. 25-214. May demand fees for publication of notice. 25-215. Meaning of term "folio." 25-216. Mileage—how computed—service of more than one process. Mileage—how computed—shortest traveled route. 25-217. 25-218. Witnesses on behalf of state or county. 25-219. Certificate of clerk to witness. 25-220. Preceding sections construed. 25-221. Officers to complete the business of their offices.
 25-222. Penalty for false oath.
 25-223. Penalty for failure to pay over fees.
 25-224. Penalty for making false report. 25-225. Penalty for sheriff falsely representing his mileage. 25-226. Fees of sheriff. 25-227. Fees for board of prisoners. 25-228. Duration of act. 25-229. Sheriff falsely representing Sheriff falsely representing his expenses for boarding prisoners. 25-230. Board of county commissioners to declare office vacant, when. 25-231. Fees of county clerks. Fees of clerk of district court. 25-232. 25-233. Fees of clerk in probate proceedings. Fees of county treasurer for tax deed. Fees of county surveyor. 25-235. 25-236. Fees of coroner. 25-237. Fees of public administrator.
- 25-201. (4864) Disposal of fees collected by county officers. No county officer shall receive for his own use, any fees, penalties or emoluments of any kind, except the salary as provided by law, for any official service rendered by him, but all fees, penalties and emoluments of every kind must

be collected by him for the sole use of the county and must be accounted for and paid to the county treasurer as provided by section 25-203 of this code and shall be credited to the general fund of the county.

History: En. Sec. 4591, Pol. C. 1895; re-en. Sec. 3112, Rev. C. 1907; re-en. Sec. 4864, R. C. M. 1921; amd. Sec. 3, Ch. 141, L. 1925.

Cross-Reference

Report of fees by county officers, secs. 16-2423 to 16-2427.

Clerk of District Court

The fees of the clerk in probate proceedings, exacted under section 25-233, must be paid by him to the county treas-

urer, and they become a part of the public moneys of the county. Hauser v. Miller, 37 M 22, 25, 94 P 197.

References

Hogan v. Cascade County, 36 M 183, 186, 92 P 529; State v. Hale, 126 M 326, 249 P 2d 405; State v. Hale, 129 M 449, 291 P 2d 229, 234.

Collateral References

Counties \$20 (1). 20 C.J.S. Counties \$ 148.

25-202. (4865) What officers to receive fees for their own use. The county surveyor, coroner, public administrator, justice of the peace, and constable may collect and receive for their own use, respectively, for official services, the fees and emoluments prescribed in this chapter. All other county officers receive salaries.

History: En. Sec. 4592, Pol. C. 1895; re-en. Sec. 3113, Rev. C. 1907; re-en. Sec. 4865, R. C. M. 1921.

Construction

The last sentence in this section is unnecessary, unless its purpose is to advise the people that salaried officers are not to have "fees and emoluments" other than salaries from the state or county. Scharrenbroich v. Lewis and Clark County, 33 M 250, 257, 83 P 482.

"Fees" Defined

In this section the term "fees" means a mode of compensation different from salary. State v. Story, 53 M 573, 578, 165 P 748.

Collateral References Counties \$\infty 71. 20 C.J.S. Counties \$ 112.

25-203. (4887) Fees must be paid into county treasury, when. All salaried officers of the several counties must charge and collect for the use of their respective counties, and pay into the county treasury on the first Monday in each month, all the fees now or hereafter allowed by law, paid or chargeable in all cases, except as provided in section 93-8627; provided, however, that nothing in this section shall be held to apply to the compensation received by the sheriff as mileage while in the performance of official duties, or for the board of prisoners or other persons while in his custody.

History: En. Sec. 4606, Pol. C. 1895; re-en. Sec. 3139, Rev. C. 1907; re-en. Sec. 4887, R. C. M. 1921.

"Fees" Defined

The term "fees," as used in this section, imports specific charges to be collected from private individuals for particular services. State v. Story, 53 M 573, 578, 165 P 748.

References

State ex rel. Bullock v. District Court, 62 M 600, 601, 205 P 955; Crow Creek Irr. Dist. v. Crittenden, 71 M 66, 68, 227 P 63; State v. Hale, 129 M 449, 291 P 2d 229, 235.

Collateral References

Counties \$ 30 (1). 20 C.J.S. Counties § 148.

25-204. (4888) Statement and affidavit of fees collected. The fees and compensation collected and chargeable for the use of the county in each month must be paid to the county treasurer on the first Monday of the following month, and must be accompanied by a statement and copy of the

fee book for the preceding month, duly verified by the officer making such payment. The affidavit must be in the following form:

		State	01	TATOI	mana,			_		
Cou	nty	o f					s	8.		
-	Ι,				, of	the	coun	ty	of	
the	fee	book	in	my	office	con	tains	a	true	staten

..... do swear that nent in detail of all fees and compensations of every kind and nature for official services rendered by me, paid or chargeable, or by my deputies or assistants, for the month of, A. D. 19..., and that said fee book shows the full amount received or chargeable in said month, and since my last monthly payment; and neither myself, nor, to my knowledge or belief, any of my deputies or assistants, have rendered any official services, except for the county or state, which is not fully set out in said fee book; and that the foregoing statement thereof is a full, true, and correct copy thereof. Sub-

History: En. Sec. 4607, Pol. C. 1895; tion, imports specific charges to be collected from private individuals for particular services. State v. Story. 53 M 573. 578, 165 P 748.

"Fees" Defined

The term "fees," as used in this sec-

25-205. (4889) Treasurer to file affidavits and statements. The treasurer must file and preserve in his office said statements and affidavits, and must issue to the officer one original and one duplicate receipt therefor, and the officer receiving said receipts must preserve one in his office and file the duplicate with the county clerk, whereupon the clerk must charge the treasurer with the amount shown by the receipt.

History: En. Sec. 4608, Pol. C. 1895; re-en. Sec. 3141, Rev. C. 1907; re-en. Sec. 4889, R. C. M. 1921.

25-206. (4890) Payment of salary not to be made until statement and report filed. The board of county commissioners must not order the payment of the salary of any such officer until he has filed the duplicate receipt with the county clerk, properly signed by the treasurer, showing that he has made the statement and settlement for that month, required in this chapter, and filed the report prescribed in section 16-2423.

History: En. Sec. 4609, Pol. C. 1895; re-en. Sec. 3142, Rev. C. 1907; re-en. Sec. 4890, R. C. M. 1921.

Collateral References Counties \$\infty 75 (4). 20 C.J.S. Counties § 125.

25-207. (4891) Board not to allow compensation of deputies until affidavit filed. The board must not order the payment of the compensation of any deputy until he has signed and filed with the county clerk the following affidavit:

State of Montana.

I do swear that I have rendered services as deputy the month of, 19..., and that I am entitled to receive the full sum of my compensation for the same for my own use and benefit, and that I have not paid, deposited, or assigned, nor contracted to pay, deposit, or assign any part of such compensation for the use of any other person, nor in any way, directly or indirectly, paid or given, nor contracted to pay or give, any reward or compensation for my appointment to office, or the emoluments thereof, to my principal or to any other person.

History: En. Sec. 4610, Pol. C. 1895; re-en. Sec. 3143, Rev. C. 1907; re-en. Sec. 4891, R. C. M. 1921.

Salary for Time Not Served

Where deputy did not serve three

months because of illness, he could not, by mandamus, force payment of his salary for those three months. State ex rel. Rusch v. Board of County Commrs. of Yellowstone County, 121 M 162, 191 P 2d 670, 673.

25-208. (4892) Fees must be paid in advance. The officers mentioned in this chapter must not, in any case, perform any official services unless the fees prescribed for such services are paid in advance, and on such payment the officers must perform the services required. For every failure or refusal to perform official duty when the fees are tendered, the officer is liable on his official bond.

History: En. Sec. 4611, Pol. C. 1895; re-en. Sec. 3144, Rev. C. 1907; re-en. Sec. 4892, R. C. M. 1921.

Construction

The provisions of this section are controlled by section 16-2915, whereby the county clerk may, but is not required to, demand prepayment of filing or other fees. Minneapolis Steel & Machinery Co. v. Thomas, 54 M 132, 135, 168 P 40.

"Fees" Defined

The term "fees," as used in this section, imports specific charges to be collected from private individuals for particular services. State v. Story, 53 M 573, 578, 165 P 748.

Collateral References

Counties 79. 20 C.J.S. Counties § 125.

25-209. (4893) No fees to be charged state, county or public officer. No fees must be charged the state, or any county, or any subdivision thereof, or any public officer acting therefor, or in habeas corpus proceedings for official services rendered, and all such services must be performed without the payment of fees.

History: En. Sec. 4612, Pol. C. 1895; re-en. Sec. 3145, Rev. C. 1907; re-en. Sec. 4893, R. C. M. 1921.

"Fees" Defined

The term "fees," as used in this section, imports specific charges to be collected from private individuals for particular services. State v. Story, 53 M 573, 578, 165 P 748.

Irrigation District

An irrigation district created under chapter 146, Laws of 1909 (89-1201 et seq.), is a public corporation exercising essential governmental functions, one of which is the right to levy taxes, organized for the government of a portion of the state and for the promotion of the

public welfare, and as such must be deemed a subdivision of the state within the meaning of this section relieving it, as such subdivision, from the payment of fees for the recordation of papers in the county clerk and recorder's office. Crow Creek Irr. Dist. v. Crittenden, 71 M 66, 68, 227 P 63, explained in 85 M 466, 476, 279 P 369.

References

Thaanum v. Bynum Irr. Dist., 72 M 221, 225, 232 P 528; Buffalo Rapids Irr. Dist. v. Colleran, 85 M 466, 476, 279 P 369.

Collateral References

Counties 77; Habeas Corpus 116. 20 C.J.S. Counties § 112; 39 C.J.S. Habeas Corpus § 106. 25-210. (4894) Fees for naturalization. The clerk of the district court shall collect from every person to whom a final certificate of naturalization is issued, at the time the same is issued, a fee of two dollars and fifty cents (\$2.50); and no other fee shall be charged for naturalization papers, or for the record thereof. All fees must be accounted for and paid to the county treasurer as provided by section 25-203, and shall be credited to the general fund of the county.

History: En. Sec. 1, p. 50, L. 1899; re-en. Sec. 3146, Rev. C. 1907; re-en. Sec. 4894, R. C. M. 1921; amd. Sec. 1, Ch. 73, L. 1967.

Collateral References Clerks of Courts 521. 14 C.J.S. Clerks of Courts § 16.

25-211. (4895) Officer must give itemized receipt. Every officer, upon receiving any fees for official duty or service, may be required by the person paying the same to make out in writing, and deliver to such person, a particular account of such fees, specifying for what they accrued, respectively, and must receipt the same; and if he refuse or neglect so to do when required, he is liable to the party paying the same in treble the amount so paid.

History: En. Sec. 4614, Pol. C. 1895; re-en. Sec. 3147, Rev. C. 1907; re-en. Sec. 4895, R. C. M. 1921.

"Fees" Defined

The term "fees," as used in this section imports specific charges to be collected

from private individuals for particular services. State v. Story, 53 M 573, 578, 165 P 748.

Collateral References

Counties ₹ 79. 20 C.J.S. Counties § 127.

25-212. (4896) Must keep statement posted in his office. It is the duty of each officer entitled to collect fees to keep posted in his office a plain and legible statement of the fees allowed by law; a failure so to do subjects the officer to a fine of one hundred dollars and costs, to be recovered by the county attorney in the name of the state.

History: En. Sec. 4615, Pol. C. 1895; re-en. Sec. 3148, Rev. C. 1907; re-en. Sec. 4896, R. C. M. 1921.

"Fees" Defined

The term "fees," as used in this sec-

tion, imports specific charges to be collected from private individuals for particular services. State v. Story, 53 M 573, 578, 165 P 748.

25-213. (4897) Officer must not receive any other fees than those named. The officers above named must receive no other fees for any services performed by them in any action or proceeding, or for the performance of any service for which fees are allowed; and in case of any violation of the provisions of this chapter, the party demanding or receiving any fees not herein allowed is liable to refund the same to the party aggrieved, with treble the amounts as damages, besides costs of suit.

History: En. Sec. 4616, Pol. C. 1895; re-en. Sec. 3149, Rev. C. 1907; re-en. Sec. 4897, R. C. M. 1921.

"Fees" Defined

The term "fccs," as used in this section, imports specific charges to be collected from private individuals for par-

ticular services. State v. Story, 53 M 573, 578, 165 P 748.

Recovery of Illegal Fees

A civil suit to recover illegal fees, which had been demanded and received under color of office, can be brought against an officer who has not been convicted in a criminal action. Ming v. Truett, 1 M 322, 327, overruled on another point in 9 M 201, 217, 23 P 515.

Collateral References Counties \$\infty 77. 20 C.J.S. Counties \$ 112.

25-214. (4898) May demand fees for publication of notice. When, by law, any publication is required to be made by an officer of any suit, process, notice, order, or other paper, the costs of the same must be first tendered by the party, if demanded, for whom such order of publication was granted, before the officer is compelled to make such publication.

History: En. Sec. 4617, Pol. C. 1895; re-en. Sec. 3150, Rev. C. 1907; re-en. Sec. 4898, R. C. M. 1921.

Costs©=274. 20 C.J.S. Costs § 416.

25-215. (4899) Meaning of term "folio." The term "folio," when used as a measure for computing fees, means one hundred words, counting every two figures, necessarily used, as a word. Any portion of a folio, when in the whole paper there is not a complete folio, and when there is an excess over the last folio exceeding one-half, may be computed as a folio.

History: En. Sec. 4618, Pol. C. 1895; re-en. Sec. 3151, Rev. C. 1907; re-en. Sec. 4899, R. C. M. 1921.

"Fees" Defined

The term "fees," as used in this section, refers to costs of publications. State v. Story, 53 M 573, 578, 165 P 748.

References

Shelley v. Normile, 109 M 117, 123, 94 P 2d 206.

Collateral References

Counties 77. 20 C.J.S. Counties § 112.

25-216. (4900) Mileage — how computed — service of more than one process. When any sheriff, constable, or coroner serves more than one process in the same cause, not requiring more than one journey from his office, he shall receive mileage only for the more distant service, and no mileage in any case must be allowed for less than one mile actually traveled.

History: En. Sec. 4619, Pol. C. 1895; re-en. Sec. 3152, Rev. C. 1907; re-en. Sec. 4900, R. C. M. 1921.

Collateral References

Coroners 7; Sheriffs and Constables 61.

18 C.J.S. Coroners § 28; 80 C.J.S. Sheriffs and Constables § 251.

25-217. (4901) Mileage — how computed — shortest traveled route. Wherever mileage is allowed to any sheriff or other officer, juror, witness, or other person, under any law of Montana, the same shall be computed according to the shortest traveled route, when such shortest route is passable.

History: En. Sec. 1, Ch. 7, L. 1919; reen. Sec. 4901, R. C. M. 1921.

50 C.J.S. Juries § 207; 80 C.J.S. Sheriffs and Constables § 251; 97 C.J.S. Witnesses §§ 37, 38, 43.

Collateral References

Jury 77 (1); Sheriffs and Constables 51; Witnesses 29.

25-218. (4902) Witnesses on behalf of state or county. The attorney general or any county attorney is authorized to cause subpoenas to be issued, and compel the attendance of witnesses on behalf of the state or county, without paying or tendering fees in advance to either officers or witnesses; and any witness refusing to or failing to attend, after being served with a subpoena, may be proceeded against, and is liable in the

same manner as is provided by law in other cases where fees have been tendered or paid.

History: En. Sec. 4620, Pol. C. 1895; re-en. Sec. 3153, Rev. C. 1907; re-en. Sec. 4902, R. C. M. 1921.

Collateral References
Witnesses \$ 14.
97 C.J.S. Witnesses § 36.

References

Griggs v. Glass, 58 M 476, 479, 193 P 564.

25-219. (4903) Certificate of clerk to witness. The clerk of any court before which any witness shall have attended on behalf of the state or county, in any civil action, must give to such witness a certificate, under seal, of travel and attendance, which shall entitle him to receive the amount therein stated from the state or county treasurer.

History: En. Sec. 4621, Pol. C. 1895; re-en. Sec. 3154, Rev. C. 1907; re-en. Sec. 4903, R. C. M. 1921.

Jurors' Certificates

The rule applicable to jurors' certificates applies also to witnesses' certificates; the clerk must observe the same formalities in issuing them. County of Silver Bow v. Davies, 40 M 418, 425, 107 P 81.

Payment of Certificates

This section does not require the certif-

icates to be addressed to the treasurer; his duty requires him to pay upon their presentation. County of Silver Bow v. Davies, 40 M 418, 425, 107 P 81.

References

Griggs v. Glass, 58 M 476, 480, 193 P 564; Helena Adjustment Co. v. Claffin, 75 M 317, 326, 243 P 1063.

Collateral References

Witnesses © 29. 97 C.J.S. Witnesses § 44.

25-220. (4904) Preceding sections construed. The provisions of the two preceding sections of this chapter shall extend to all actions and proceedings brought in the name of the attorney general, or any other person or persons, for the benefit of the state or county.

History: En. Sec. 4622, Pol. C. 1895; re-en. Sec. 3155, Rev. C. 1907; re-en. Sec. 4904, R. C. M. 1921.

References

Griggs v. Glass, 58 M 476, 480, 193 P 564.

25-221. (4905) Officers to complete the business of their offices. It is the duty of all officers to complete the business of their respective offices to the time of the expiration of their respective terms; and in case any officer, at the close of his term, leaves to his successor official labor to be performed, for which he has received compensation, or which it was his duty to perform, he is liable to pay to his successor the full value of such services, which may be recovered in any court of competent jurisdiction, upon action brought against him on his official bond.

History: En. Sec. 4623, Pol. C. 1895; re-en. Sec. 3156, Rev. C. 1907; re-en. Sec. 4905, R. C. M. 1921.

Collateral References Officers©=94. 67 C.J.S. Officers § 83.

25-222. (4906) **Penalty for false cath.** Every person who takes a false oath, under the provisions of this chapter, is punishable as provided in section 94-3801.

History: En. Sec. 4624, Pol. C. 1895; re-en. Sec. 3157, Rev. C. 1907; re-en. Sec. 4906, R. C. M. 1921.

Collateral References
Perjury \$\simega 9.
70 C.J.S. Perjury \{ 20 et seq.

25-223. (4907) Penalty for failure to pay over fees. Every officer who fails or refuses to pay over any fees collected by him to the county treas-

urer, or fails to collect the same, as provided by this chapter, is punishable as provided in section 94-1502.

History: En. Sec. 4625, Pol. C. 1895; re-en. Sec. 3158, Rev. C. 1907; re-en. Sec. 4907, R. C. M. 1921.

Counties \$20 C.J.S. Counties \$146.

25-224. (4908) Penalty for making false report. Every officer who makes a false report of the fees received by him is guilty of a felony and punishable as provided in section 94-115.

History: En. Sec. 4626, Pol. C. 1895; re-en. Sec. 3159, Rev. C. 1907; re-en. Sec. 4908, R. C. M. 1921.

25-225. (4909) Penalty for sheriff falsely representing his mileage. Every sheriff who falsely represents to the board of county commissioners or board of examiners his actual traveling expenses in the performance of any official duty, or causes to be paid to him from the state or any county treasury a sum exceeding his actual expenses in the performance of such duty, is punishable as provided in sections 94-115 and 94-1517.

History: En. Sec. 4627, Pol. C. 1895; re-en. Sec. 3160, Rev. C. 1907; re-en. Sec. 4909, R. C. M. 1921.

Collateral References

Sheriffs and Constables \$\infty 153.

80 C.J.S. Sheriffs and Constables \\$\\$ 209,

25-226. (4916) Fees of sheriff. (1) For the service of summons and complaint on each defendant, one dollar (\$1.00);

For levying and serving each writ of attachment of execution on real or personal property, one dollar (\$1.00);

For service of attachment on the body or order of arrest on each defendant, one dollar (\$1.00);

For the service of affidavit, order, and undertaking in claim and delivery, one dollar (\$1.00);

For serving a subpoena, twenty-five cents (25c) for each witness summoned:

For serving writ of possession or restitution, two dollars (\$2.00);

For trial of the right of property or damages, including all services except mileage, three dollars (\$3.00);

For taking bond or undertaking in any case authorized by law, one dollar (\$1.00);

For serving every notice, rule or order, one dollar (\$1.00), for each person served:

For copy of any writ, process or other paper when demanded or required by law, twenty cents (20c) for each folio;

For advertising any property for sale on execution or under any judgment or order of sale, exclusive of cost of publication, one dollar (\$1.00);

(2) For the expense in taking and keeping possession of and preserving property under attachment, execution or other process, such sum as the court or judge may order, not to exceed the actual expense incurred, and no keeper must receive to exceed five dollars (\$5.00) per day and no keeper must be employed without an order of court, nor must he be so employed unless the property is of such character as to need the personal attention and supervision of a keeper. No property shall be placed in charge

of a keeper if it can be safely and securely stored, or where there is no reasonable danger of loss.

- (3) In addition to the fees above specified, the sheriff shall receive for each mile actually traveled, in serving any writ, process, order or other paper, including a warrant of arrest, or in conveying a person under arrest before a magistrate or to jail, only his actual expenses when such travel is made by railroad, and when travel is other than by railroad, he shall receive eleven cents (11¢) per mile for each mile actually traveled by him both going and returning, and the actual expenses incurred by him in conveying a person under arrest before a magistrate or to jail, and he shall receive the same mileage and his actual expenses for the person conveyed or transported under order of court within the county, the same to be in full payment for transporting and dieting such persons during such transportation; provided that where more than one person is transported by the sheriff or when one or more papers are served on the same trip made for the transportation of one or more prisoners, but one mileage shall be charged.
- Provided further, that this act shall not apply to the delivery of prisoners at the state prison or at the reform school, or insane persons to the state insane asylum, for which he shall receive the actual expense incurred as provided by section 16-2723 of this code. Nor shall this act apply to trips made for the return of fugitives apprehended and arrested outside the county for which the sheriff shall receive the actual necessary expenses incurred in going for and returning with such fugitive, provided that in determining the actual expense, if travel be by a privately owned vehicle, the mileage rate shall be allowed as herein provided. But no mileage must be allowed on an attachment, order of arrest, order for delivery of personal property, or any other order, notice or paper, when the same accompanies the summons, and the service thereof may be made at the time of the service of the summons, unless for the distance actually traveled beyond that required to serve the summons. When two or more papers are served on the same person at the same time, or when any paper or papers are served on more than one person on the same trip, but one mileage must be allowed or charged, and in the service of subpoenas, but one mileage must be charged when the persons named therein live in the same place or in the same direction, but mileage must be charged for the longest distance actually traveled. Any writ, order or other paper for service, must be received at any place in the county where a sheriff or a deputy is found, and mileage must be computed from such place, but if papers are delivered for service away from the county seat, all necessary copies thereof must be furnished for service. When two or more officers travel in the same automobile in the discharge of any duty but one mileage shall be allowed.

History: En. Sec. 4634, Pol. C. 1895; re-en. Sec. 3167, Rev. C. 1907; amd. Sec. 1, Ch. 111, L. 1919; re-en. Sec. 4916, R. C. M. 1921; amd. Sec. 1, Ch. 111, L. 1927; amd. Sec. 1, Ch. 89, L. 1929; amd. Sec. 1, Ch. 121, L. 1933; amd. Sec. 1, Ch. 139, L. 1937; amd. Sec. 4, Ch. 121, L. 1941; amd. Sec. 2, Ch. 59, L. 1949; amd. Sec. 2, Ch. 82, L. 1957.

Agreement for Extra Fees

There is no rule in Montana that bars an attaching creditor from entering into a private agreement with the sheriff to pay such sheriff out of the attaching creditor's own pocket additional compensation over and above that contemplated by the statute. Bucher v. Fraser, 138 M 83, 354 P 2d 1042, 1047.

"Fees" Defined

The term "fees," as used in this section, refers to the sheriff's mileage as well as his other charges. State v. Story, 53 M 573, 578, 165 P 748.

Keeper of Attached Property

Under this section the necessity for the appointment of a keeper of attached property is a question to be determined by the trial court, taking into consideration all facts and circumstances, and on appeal, defendant debtor may not complain for the first time that the appointment was unnecessary and improper and that the expense had been unnecessarily incurred. Chowning v. Madison Land & Irrigation Co., 84 M 494, 499, 276 P 946.

References

Jurgens v. Hauser, 19 M 184, 185, 47

P 809; Wade v. Lewis and Clarke County, 24 M 335, 339, 61 P 879; Daly v. Kelley, 57 M 306, 187 P 1022; Brannin v. Sweet Grass County, 88 M 412, 416, 293 P 970; Letz v. Letz, 123 M 494, 215 P 2d 534; Engle v. Pfister, 127 M 65, 257 P 2d 561, 562.

Collateral References

Sheriffs and Constables 28 et seq. 80 C.J.S. Sheriffs and Constables §§ 215, 218.

47 Am. Jur. 886, Sheriffs, Police, and Constables, § 96 et seq.

Right, in absence of express statute, of one governmental unit, or officers thereof, to compensation for collecting or disbursing special taxes or assessments levied by or owed to another governmental unit. 114 ALR 1098.

25-227. (4886) Fees for board of prisoners. The fees allowed sheriffs of the several counties of the state for the board of prisoners confined in jail under their charge shall be at the rate of one dollar and seventy-five cents (\$1.75) per day for each of said prisoners, when the number of prisoners shall be twenty (20) or less each day. When the number of prisoners per day shall exceed twenty (20) and be less than thirty (30) then at the rate of one dollar and fifty cents (\$1.50) per day for each of said prisoners in excess of twenty (20) per day. When the number of prisoners per day shall exceed twenty-nine (29) and be less than forty (40), then at the rate of one dollar and twenty-five cents (\$1.25) per day for each and all of said prisoners in excess of twenty-nine (29); and when the number of prisoners per day shall exceed thirty-nine (39), then at the rate of one dollar (\$1.00) per day for each of said prisoners in excess of thirty-nine (39); provided the term "per day" shall mean a twenty-four (24) hour period in which at least one substantial meal has been served to such prisoner.

History: En. Sec. 4605, Pol. C. 1895; re-en. Sec. 3138, Rev. C. 1907; amd. Sec. 1, Ch. 81, L. 1919; re-en. Sec. 4886, R. C. M. 1921; amd. Sec. 1, Ch. 77, L. 1943; amd. Sec. 1, Ch. 103, L. 1949; amd. Sec. 1, Ch. 131, L. 1951.

Application of Section

This section, limiting the fees of the sheriff for the board of prisoners to a certain amount per day for each prisoner, has reference to prisoners confined by state authority and not to federal prisoners. Majors v. County of Lewis and Clark, 60 M 608, 616, 201 P 268.

"Board" Defined

While the word "board" may include both room rent and meals, as used in this section, fixing the fee allowable to a sheriff for "board of prisoners" confined in the county jail, means food or meals only, since under section 16-2804, counties must provide for a county jail with a sufficient number of rooms to accommodate the prisoners confined therein. Pacific Coal Co. v. Silver Bow County, 79 M 323, 324, 256 P 386.

False and Fraudulent Report

An information which charges that defendants presented for allowance to the board of county commissioners a "certain false and fraudulent monthly report concerning board furnished Missoula County prisoners" is insufficient to state an offense unless accompanied by a statement of facts upon which the charges of falsehood or fraud rest. State v. MacLean, 129 M 500, 291 P 2d 250, 252. (Concurring and dissenting opinion, 129 M 500, 291 P 2d 250, 252.)

"Fees" Defined

The term "fees," as used in this section, designates the recompense payable by the

county for boarding prisoners. State v. Story, 53 M 573, 578, 165 P 748.

Fuel for Preparing Food

The fee allowed to sheriffs by this section for board of prisoners confined in the county jail covers the total amount of the county's liability for that purpose; hence a charge for fuel for preparing the

food was properly disallowed by the board of county commissioners. Pacific Coal Co. v. Silver Bow County, 79 M 323, 324, 256 P 386.

Collateral References

Prisons € 2). 72 C.J.S. Prisons § 25.

25-228. Duration of act. This act shall be in full force and effect from and after its passage and approval, and shall remain in force during the war and for a period of six (6) months thereafter, and not longer.

History: En. Sec. 3, Ch. 77, L. 1943.

25-229. (4910) Sheriff falsely representing his expenses for boarding prisoners. Every sheriff who falsely represents to the board of county commissioners the actual expenses of boarding prisoners, or for furnishing food and supplies therefor, or for any service rendered in connection therewith, or presents to said board false items in a claim or false vouchers, or makes any profit whatever out of the board or keeping of prisoners in his custody, and every person who gives a false item or false voucher to be used by such sheriff in any claim against the county before such board, is punishable as provided in sections 94-115 and 94-1517.

History: En. Sec. 4628, Pol. C. 1895; re-en. Sec. 3161, Rev. C. 1907; re-en. Sec. 4910, R. C. M. 1921.

Information

Information which charges that defendants presented for allowance to the board of county commissioners a certain false and fraudulent monthly report concerning board furnished Missoula County prisoners is insufficient to state an offense unless accompanied by a statement of facts upon which the charges of falsehood or fraud rest. State v. MacLean, 129 M 500, 291 P 2d 250, 252. (Concurring and dissenting opinion, 129 M 500, 291 P 2d 250, 252.)

25-230. (4911) Board of county commissioners to declare office vacant, when. The board of county commissioners, upon receiving a certified copy of the record of conviction of any officer for receiving illegal fees, or where the officer collects fees and fails to account for the same, upon proof thereof, must declare his office vacant and appoint his successor.

History: En. Sec. 4629, Pol. C. 1895; re-en. Sec. 3162, Rev. C. 1907; re-en. Sec. 4911, R. C. M. 1921.

Collateral References Counties \$\infty 65. 20 C.J.S. Counties \$ 107.

25-231. (4917) Fees of county clerks. The fees of county clerks, which must be charged and collected for the use of their respective counties, are as follows:

For recording and indexing each instrument of writing allowed by law to be recorded; except as hereinafter provided;

For first folio, sixty cents (60¢) and for each subsequent folio or fraction thereof, thirty cents (30¢);

For each entry in index, twenty cents (20¢);

For certificate that such instrument has been recorded with seal affixed, one dollar (\$1.00);

For recording and indexing each real estate mortgage, assignment, renewal, or release of real estate mortgage;

For each folio, forty cents (40¢);

For each entry in index, twenty cents (20¢);

For certificate that such mortgage, assignment or release has been recorded with seal affixed, one dollar (\$1.00):

For recording and indexing each certificate of location of quartz or placer mining claim, millsite claim, or notice of appropriation of water, including certificate that such instrument has been recorded with seal affixed, four dollars (\$4.00);

For recording and indexing each affidavit of annual labor on mining claim, including certificate that such instrument has been recorded with seal affixed, two dollars (\$2.00) for the first mining claim in said affidavit, and fifty cents ($\$0\phi$) for each additional mining claim described and included therein;

For filing and indexing each writ of attachment, execution, certificate of sale, lien, or other instrument required by law to be filed and indexed, one dollar (\$1.00):

For filing and indexing each certificate of incorporation or annual statement of any corporation, two dollars (\$2.00);

For recording and platting each townsite or map;

For each lot up to and including one hundred, fifty cents (50¢);

For each additional lot in excess of one hundred, ten cents (10¢);

For recording the field notes of survey of any townsite, per folio, fifty cents (50¢).

Provided that in all cases where recording is done by photographic or similar process the fee to be charged by the county clerk and recorder for filing and indexing the same shall be two dollars (\$2.00) for each page or fraction thereof of said instrument.

For a copy of any record or paper, for each folio, thirty cents (30¢) and for each certification with seal affixed, one dollar (\$1.00); provided, that in all cases where copies of any record or paper are to be certified by the county clerk and such copy is furnished to said clerk for certification, said clerk shall not make a charge nor receive a fee for the comparison of such copy, other than the fee of one dollar (\$1.00) for his certificate and seal.

For searching any index record of files of the office, for each year when required, in abstracting or otherwise, thirty cents (30¢);

For each entry of discharge or satisfaction of mortgage, lien or other instrument on the margin of record thereof, or upon the original instrument, and noting same in the indexes concerned, fifty cents (50¢);

For administering an oath with certificate and seal he shall make no

charge;

For taking and certifying an acknowledgment, with seal affixed, for

signature thereto he shall make no charge;

For recording and indexing any instrument which may be recorded pursuant to the provisions of section 73-104, and which pertains to land allotted to an Indian or land within an Indian reservation, except fee patents, he shall make no charge;

For filing, indexing, or other services provided for by Part 4 of the Uniform Commercial Code—Secured Transactions, such fees as are pre-

scribed therein.

For filing or recording or indexing any other instrument not herein expressly provided for, the same fee as hereinbefore provided for a similar service.

On each instrument delivered to him for recording, it shall be the duty of the county clerk to endorse thereon all charges made by him for such service and such endorsement shall be recorded as a part of the instrument in his office in order that the state examiner may verify such charges from time to time and may see that they have been properly entered on the fee book or reception record in the county clerk's office.

History: En. Sec. 4635, Pol. C. 1895; re-en. Sec. 3168, Rev. C. 1907; amd. Sec. 1, Ch. 117, L. 1911; re-en. Sec. 4917, R. C. M. 1921; amd. Sec. 1, Ch. 87, L. 1941; amd. Sec. 1, Ch. 90, L. 1953; amd. Sec. 1, Ch. 202, L. 1955; amd. Sec. 2, Ch. 148, L. 1957; amd. Sec. 1, Ch. 9, L. 1959; amd. Sec. 11-115, Ch. 264, L. 1963.

Cross-References

Fees for recording and indexing papers concerning Co-operative Marketing Act, sec. 14-429.

Secured transactions, filing fees, secs. 87A-9-403 to 87A-9-407.

Collateral References

Counties 74 (2). 20 C.J.S. Counties § 117.

25-232. (4918) Fees of clerk of district court. At the commencement of each action or proceeding, the clerk must collect from the plaintiff the sum of ten dollars (\$10), and for filing a complaint in intervention the clerk must collect from the intervenor the sum of ten dollars (\$10);

And the defendant, on his appearance, must pay the sum of five dollars (\$5) (which includes all the fees to be paid up to the entry of judgment).

On the entry of judgment in favor of plaintiff, he must pay the additional sum of five dollars (\$5);

And if in favor of defendant, the defendant must pay the sum of ten dollars (\$10) (which includes all the clerk's costs for all services rendered in any action or proceeding, except issuing execution or order of sale, and the fees for transcript on appeal. If the action is dismissed, no fee for the entry of judgment need be paid, unless the party desires the entry of such judgment).

For filing the papers and transcript on appeal from a justice or other inferior court or other tribunal, the party appealing must pay the sum of ten dollars (\$10) (which includes all costs up to the entry of judgment).

For entry of judgment in favor of party appealing, he must pay the sum of five dollars (\$5).

For entry of judgment in favor of the other party, or respondent, he must pay the sum of ten dollars (\$10) (which includes all the clerk's costs for all services rendered on such appeal).

For certifying transcripts on appeal, where the same are not prepared by him, five dollars (\$5), and in addition thereto, five cents (\$.05) per page for each page in excess of two hundred (200) pages.

And where he prepares such transcript, in addition thereto, per folio, fifteen cents (\$.15).

For preparing copies of papers in his office, per folio, fifteen cents (\$.15), when certified to, in addition thereto, fifty cents (\$.50) for certificate and seal.

For certificate with seal, fifty cents (\$.50).

For oath and jurat, with seal, fifty cents (\$.50).

For administering oath, twenty-five cents (\$.25).

For taking depositions, per folio, twenty cents (\$.20).

For filing and docketing transcript of judgment from all other courts and issuing execution thereon, two dollars and fifty cents (\$2.50).

For issuing execution and all services connected therewith, one dollar (\$1).

For issuing execution or order of sale on foreclosure of liens, one dollar (\$1).

And in addition per folio, twenty cents (\$.20).

For searching records of files for each year, except for suitors or their attorneys, twenty-five cents (\$.25).

For transmission of records or files or transfer of cases to other courts, two dollars and fifty cents (\$2.50).

For filing and entering papers on transfer from other courts, five dollars (\$5).

For making, acknowledging, and procuring the signature of judge to deed of lot in townsite, four dollars (\$4).

For issuing a marriage license, five dollars (\$5).

One-quarter $(\frac{1}{4})$ of all fees collected by said clerk of the district court must be paid to the secretary of the public employees' retirement system board to be credited to the judges' retirement fund.

History: En. Sec. 4636, Pol. C. 1895; re-en. Sec. 3169, Rev. C. 1907; amd. Sec. 1, Ch. 88, L. 1917; re-en. Sec. 4918, R. C. M. 1921; amd. Sec. 1, Ch. 218, L. 1967.

Transcript in Special Proceedings

As this section makes no provision for the collection of a fee for making a transcript in special proceedings, such a fee is not a necessary disbursement, and the clerk is not authorized to collect the same State ex rel. Baker v. Second Judicial District Court, 24 M 425, 427, 62 P 688, distinguished in 25 M 1, 3, 63 P 402; State ex rel. Healy v. District Court, 26 M 224, 226, 67 P 114, 68 P 470. But see State ex rel. Hall v. District Court, 111 M 619, 115 P 2d 92.

Transcripts on Appeal

Transcripts on appeal may be prepared by the parties or their counsel, but the

authentication must be made by the clerk, after comparison of them with the original files, by his certificate under the seal of the district court. Shadville v. Barker, 26 M 45, 49, 66 P 496, 66 P 761.

References

Montana Ore Purchasing Co. v. Boston and Montana Consol. Copper & Silver Min. Co., 33 M 400, 403, 84 P 706; State ex rel. Doyle v. District Court, 126 M 615, 245 P 382.

Collateral References

Clerks of Courts € 11 et seq. 14 C.J.S. Clerks of Courts § 9.

Liability of clerk of court or his bond for money paid into his hands by virtue of his office. 59 ALR 60.

25-233. (4919) Fees of clerk in probate proceedings. At the time of filing the petition for letters testamentary, of administration or guardianship, the clerk must collect from the petitioner the sum of ten dollars (\$10).

For admitting a will to probate and all services connected therewith, in addition to the above, there must be paid to the clerk the sum of ten dollars (\$10).

If a will is contested, the contestant must pay to the clerk, on filing his grounds of opposition, the sum of ten dollars (\$10).

And on the entry of judgment thereon, the prevailing party must pay the sum of five dollars (\$5).

On filing a petition to determine heirship or title to an estate, the petitioner must pay to the clerk the sum of ten dollars (\$10).

On entry of judgment thereon, the prevailing party must pay the sum of five dollars (\$5).

One-quarter (¼) of all fees collected by said clerk of the district court must be paid to the secretary of the public employees' retirement system board to be credited to the judges' retirement fund.

History: En. Sec. 4637, Pol. C. 1895; re-en. Sec. 3170, Rev. C. 1907; re-en. Sec. 4919, R. C. M. 1921; amd. Sec. 2, Ch. 218, L. 1967.

Collateral References Clerks of Court € 11, 20. 14 C.J.S. Clerks of Courts §§ 9, 16.

25-234. (4920) Fees of county treasurer for tax deed. The county treasurer shall receive, for making and acknowledging a deed for property sold for delinquent taxes, the sum of three dollars.

History: En. Sec. 1, p. 49, L. 1899; re-en. Sec. 3171, Rev. C. 1907; re-en. Sec. 4920, R. C. M. 1921.

Counties 74 (3). 20 C.J.S. Counties § 119.

25-235. (4921) Fees of county surveyor. The county surveyor is entitled to receive and collect for his own use the following fees:

For services in making a survey required by any court, or if made for the county by order of the board of county commissioners, the sum of twelve (\$12.00) dollars for each working day and with travel expenses while away from home in the performance of the duties of his office, to be paid out of the contingent fund.

For copies and certificates, per folio, twenty cents (20¢).

For copy of any plat of survey, two dollars (\$2.00).

Expenses of chainmen and markers, if furnished by the surveyor, not to exceed per day, eight (\$8.00) dollars.

History: En. Sec. 4639, Pol. C. 1895; re-en. Sec. 3172, Rev. C. 1907; re-en. Sec. 4921, R. C. M. 1921; amd. Sec. 1, Ch. 199, L. 1953.

"Fees" Defined

The term "fees," as used in this section, refers to the per diem of the county surveyor, to his charges for copies, etc., and to his expenses for chainmen and markers, whether chargeable to the county or to private individuals. State v. Story, 53 M 573, 578, 165 P 748.

References

Wight v. Board of County Commrs. of Meagher County, 16 M 479, 483, 41 P 271; State ex rel. Donyes v. Board of Commrs. of Granite County, 23 M 250, 253, 58 P 439; State ex rel. Payne v. District Court, 53 M 350, 353, 165 P 294; Hicks v. Stillwater County, 84 M 38, 47, 274 P 296; Durland v. Prickett, 98 M 399, 39 P 2d 652.

Collateral References Counties \$\infty 74 (5). 20 C.J.S. Counties \\$ 118.

25-236. (4922) Fees of coroner. The coroner is entitled to receive and collect for his own use the following fees:

For each day or fraction of day engaged in making an investigation relative to a death, whether an inquest is later held or not, the sum of five dollars (\$5.00), provided that not more than one day's fees shall be charged for making an investigation in any one case, except in counties of the first, second and third class;

For each day or fraction of day engaged in holding an inquest, five dollars (\$5.00), provided that not more than two days' fees shall be charged for holding an inquest in any one case;

For subpoening each witness, including copy of subpoening, thirty cents (30c);

For summoning each juror, including copy of summons, thirty cents (30c);

For each oath administered, five cents (5c);

For making transcript of testimony, per folio, fifteen cents (15c);

For each mile actually traveled in the performance of any duty, seven cents (7c);

For filing papers, each five cents (5c);

The total amount of fees allowed by the board of county commissioners to a coroner, except when acting as sheriff, must not exceed twenty-one hundred dollars (\$2100.00) in any one year, including compensation paid all clerks, stenographers and other clerical assistants employed by him, provided the coroner in a county having a population of forty-five thousand (45,000) or more, according to the latest federal census enumeration, may, at the discretion of the county commissioners receive a salary of not to exceed three thousand seven hundred fifty dollars (\$3,750.00) per year and mileage as above provided in lieu of all fees above-mentioned, and all clerical and stenographic help except as provided in section 16-3408, shall be included in such salary. Said population to be based on the latest United States census.

A justice of the peace, acting as coroner, is allowed the same fees as the coroner, and no more.

If acting as sheriff, the coroner is allowed the same fees as sheriff or constable for like services.

History: En. Sec. 4640, Pol. C. 1895; re-en. Sec. 3173, Rev. C. 1907; re-en. Sec. 4922, R. C. M. 1921; amd. Sec. 1, Ch. 59, L. 1933; amd. Sec. 1, Ch. 9, L. 1937; amd. Sec. 1, Ch. 211, L. 1951.

"Fees" Defined

The word "fees," as used in this section, refers to the per diem and other charges of the coroner which are payable by the

county. State v. Story, 53 M 573, 578, 165 P 748.

References

State ex rel. Payne v. District Court, 53 M 350, 353, 165 P 294.

Collateral References

Coroners 7. 18 C.J.S. Coroners § 28.

25-237. (4923) Fees of public administrator. The public administrator is allowed to receive and collect for his own use, for services rendered, the same fees as are allowed executors and administrators, as provided in section 91-3407.

History: En. Sec. 4641, Pol. C. 1895; re-en. Sec. 3174, Rev. C. 1907; re-en. Sec. 4923, R. C. M. 1921.

Collateral References

Executors and Administrators 24, 488. 34 C.J.S. Executors and Administrators §§ 852, 1050.

CHAPTER 3

FEES AND SALARIES OF JUSTICES OF THE PEACE AND CONSTABLES

Section 25-301. Fees of justices of the peace in civil actions.

25-302. Fees, when payable.

25-303. Fees of justices of the peace in criminal actions.

25-304. Miscellaneous fees.

25-305. Justices may retain fees, when.

25-306. Salaries of justices of the peace in certain townships—hours—quarters.

25-307. Collection and disposition of fees in townships of ten thousand and upwards—itemized statement.

25-308. Penalty for violation of law.

25-309. Fees of constable.

25-301. (4924) Fees of justices of the peace in civil actions. The following is the schedule of fees which must be collected by justices of the peace in every civil action introduced in a justice court:

Three dollars and fifty cents (\$3.50) when summons is issued, to be paid

by the plaintiff.

Three dollars and fifty cents (\$3.50) when issue is joined, to be paid by the defendant.

Three dollars and fifty cents (\$3.50) of the prevailing party when judgment is rendered. In cases where judgment is entered by default, no charge except the three dollars and fifty cents (\$3.50) for the issuance of summons shall be made for any services, including issuing and return of execution.

Three dollars and fifty cents (\$3.50) for all services in an action where judgment is rendered by confession.

Three dollars and fifty cents (\$3.50) for filing notice of appeal and transcript on appeal, justifying and approving undertaking on appeal, and transmitting papers to the district court with certificate.

History: Ap. p. Sec. 4642, Pol. C. 1895; and as Sec. 1, Ch. 52, L. 1903; re-en. Secs. 3175-3176, Rev. C. 1907; superseded by Sec. 1, Ch. 55, L. 1921; re-en. Sec. 4924, R. C. M. 1921; amd. Sec. 1, Ch. 184, L. 1963.

Collateral References

Justices of the Peace 216.
51 C.J.S. Justices of the Peace \$ 15.

25-302. (4925) Fees, when payable. All fees must be paid in advance, and no costs shall be included in any judgment until they have been paid; provided, however, that nothing herein contained shall restrict or prevent the bringing of suits in forma pauperis as provided by law.

History: Ap. p. Sec. 4642, Pol. C. 1895; and as Sec. 1, Ch. 52, L. 1903; re-en. Secs. 3175-3176, Rev. C. 1907; superseded by Sec. 2, Ch. 55, L. 1921; re-en. Sec. 4925, R. C. M. 1921.

381 P 2d 470; Clark v. District Court, 142 M 56, 381 P 2d 472.

Counties 79. 20 C.J.S. Counties § 125.

References

Reidelbach v. District Court, 142 M 52,

25-303. (4926) Fees of justices of the peace in criminal actions. The following is the schedule of fees which must be collected by justices of the peace in every criminal action instituted in the justice court, to wit:

For all services rendered as a committing magistrate where examination is waived, three dollars and fifty cents (\$3.50).

For all services rendered as a committing magistrate where a hearing takes place and witnesses are examined, seven (\$7) dollars.

For all services rendered as a magistrate on a hearing on a complaint to bind over a person to keep the peace, three dollars and fifty cents (\$3.50).

For all services rendered where there is a plea of guilty, three dollars and fifty cents (\$3.50).

For all services rendered where there is a trial, seven (\$7) dollars.

For taking, filing, and approving bail bond, including justification, two (\$2) dollars.

For transmitting papers on appeal, and certificate, including bond and approval, three (\$3) dollars.

For all services in issuing a search warrant, to be paid by the person demanding same, (\$2) dollars.

The total amount of fees allowed by the board of county commissioners to any one justice of the peace in criminal cases must not exceed seven hundred and fifty dollars (\$750) in any one year.

History: Ap. p. Sec. 4642, Pol. C. 1895; and as Sec. 1, Ch. 52, L. 1903; re-en. Secs. 3175-3176, Rev. C. 1907; superseded by Sec. 3, Ch. 55, L. 1921; re-en. Sec. 4926, B. C. M. 1921; amd. Sec. 2, Ch. 184, L. 1963.

Cross-Reference

Fees in speed and traffic offenses, sec. 31-112.

Appeal to District Court

Dismissal of defendant's appeal to dis-

trict court of conviction in justice court on grounds that fees required by this section had not been paid was improper as such fees are a charge against the county in criminal matters. Reidelbach v. District Court, 142 M 52, 381 P 2d 470; Clark v. District Court, 142 M 56, 381 P 2d 472.

Collateral References

Justices of the Peace 16. 51 C.J.S. Justices of the Peace 15.

25-304. (4927) Miscellaneous fees. The following miscellaneous fees shall also be collected by justices of the peace, to wit:

For copies of papers on file or docket, per folio, twenty cents.

For taking the acknowledgment of an instrument, for the first name, one dollar.

For each additional name, fifty cents.

For administering oath and jurat, fifty cents.

For all services relating to lost or unclaimed property, as provided by sections 20-410 to 20-412, two dollars.

For performing the marriage ceremony and returning certificate to clerk of the district court, five dollars.

History: Ap. p. Sec. 4642, Pol. C. 1895; and as Sec. 1, Ch. 52, L. 1903; re-en. Secs. 3175-3176, Rev. C. 1907; superseded by Sec. 4, Ch. 55, L. 1921; re-en. Sec. 4927, R. C. M. 1921.

Collateral References

Justices of the Peace \$15.
51 C.J.S. Justices of the Peace \$15.

25-305. (4928) Justices may retain fees, when. Justices of the peace shall retain as their compensation the fees herein provided for, save and except in those townships where a stated salary is provided by law to be paid to justices of the peace; provided, however, that in all cases justices of the peace may retain the miscellaneous fees provided for in the preceding section.

History: Ap. p. Sec. 4642, Pol. C. 1895; and as Sec. 1, Ch. 52, L. 1903; re-en. Secs. 3175-3176, Rev. C. 1907; superseded by Sec. 5, Ch. 55, L. 1921; re-en. Sec. 4928, R. C. M. 1921.

25-306. (4929) Salaries of justices of the peace in certain townships—hours—quarters. Justices of the peace in townships having a population of ten thousand (10,000) people, and not exceeding fifteen thousand (15,000) people, shall each receive a salary of three thousand four hundred dollars (\$3,400.00) per annum, payable monthly from the county treasury;

justices of the peace in townships having a population of more than fifteen thousand (15,000) people, and not exceeding eighteen thousand (18,000) people, shall each receive a salary of three thousand six hundred dollars (\$3,600.00) per annum, payable monthly from the county treasury; justices of the peace in townships having a population of more than eighteen thousand (18,000) people, shall each receive a salary of four thousand six hundred dollars (\$4,600.00) per annum, payable monthly from the county treasury; justices of the peace in such townships shall receive no other additional fees or compensation whatever, except that they may receive and keep those fees designated as "miscellaneous fees" by section 25-304; justices of the peace in townships having a population of less than ten thousand (10,000) people shall receive the fees and emoluments provided under existing laws; justices of the peace in townships having a population of ten thousand (10,000) people and upwards shall keep their offices open for business from 9 o'clock a.m. to 12 o'clock m., and from 1 o'clock p. m. to 5 o'clock p. m. on all judicial days, and at such other hours on judicial days as they may desire; providing, however, the office may be closed from 1 o'clock p. m. to 5 o'clock p. m. on Saturdays and such justices shall occupy such quarters as may be furnished and selected for them by the board of county commissioners, and said board may, in its discretion, select suitable quarters for such justices and may, in its discretion, pay for same from money in the county treasury.

History: En. Sec. 1, Ch. 84, L. 1917; re-en. Sec. 4929, R. C. M. 1921; amd. Sec. 1, Ch. 175, L. 1949; amd. Sec. 1, Ch. 51, L. 1953; amd. Sec. 1, Ch. 47, L. 1957; amd. Sec. 3, Ch. 184, L. 1963.

False Imprisonment Action against Sheriff

In an action for false imprisonment against a sheriff and the surety on his official bond on the ground of unnecessary delay, it was essential that the plaintiff prove that a magistrate was actually avail-

able on the particular day when the false imprisonment allegedly occurred. Rounds v. Bucher, 137 M 39, 349 P 2d 1026.

References

Cline v. Tait, 113 M 475, 484, 129 P 2d 89.

Collateral References

Justices of the Peace 15, 20. 51 C.J.S. Justices of the Peace § 13, 15.

DECISIONS UNDER FORMER LAW

Where Claim for Increased Salary Not Sustained by Evidence

Where a justice of the peace presented his claim to the board of county commissioners for \$500 based on four months salary at \$125 per month on the theory that his township had a population of more than 10,000, the enumeration conducted by persons employed by him, and

from the evidence neither the board nor the court could have determined that the township contained the necessary inhabitants, judgment of court allowing the claim was reversed with directions to enter order affirming action of board of commissioners. Yancey v. Park County, 111 M 73, 76, 106 P 2d 349.

25-307. (4930) Collection and disposition of fees in townships of ten thousand and upwards—itemized statement. Justices of the peace in townships having a population of ten thousand people and upwards shall collect the fees prescribed by law for justices of the peace, except the fees in criminal actions other than for the issuance of search warrants, and shall pay the same into the county treasury of the county wherein they hold such office, on the first day of each month, to be credited to the contingent fund of such county; and shall also file therewith an itemized statement

showing all fees received during the preceding month in connection with his office; said statement shall also state that all fees required by law to be paid in connection with matters pending before him as such justice during the preceding month have been paid to him, and by him paid into the county treasury, and listed in said itemized statement, and that he has not received or been promised, nor has any one else received or been promised for him, any other moneys, emolument, or thing whatsoever by virtue of or in connection with his office; and said statement shall be subscribed and sworn to by the justice. This section, however, shall not apply to "miscellaneous fees" excepted by section 25-304, supra.

History: En. Sec. 2, Ch. 84, L. 1917; re-en. Sec. 4930, R. C. M. 1921.

NOTE.—This section held impliedly amended by section 25-303 (4926) to the extent of eliminating from section the words "except the fees in criminal cases." Opinions of Attorney General Vol. 17, Nos. 197 and 305.

Collateral References

Justices of the Peace 17. 51 C.J.S. Justices of the Peace § 16.

25-308. (4931) Penalty for violation of law. Any justice of the peace violating any of the provisions of this act shall be deemed guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or by imprisonment not exceeding six months in the county jail, or both. He shall also be deemed guilty of malfeasance in office, and, in the discretion of the court, may be removed from office, in which latter case he shall thereafter be disqualified from holding such office.

History: En. Sec. 3, Ch. 84, L. 1917; re-en. Sec. 4931, R. C. M. 1921.

Collateral References Justices of the Peace 30. 51 C.J.S. Justices of the Peace § 23.

25-309. (4932) Fees of constable. For serving summons, including copy on each defendant, besides mileage, fifty cents.

For serving subpoena, including copy on each person, besides mileage,

For all services in summoning a jury and taking charge of same, two dollars.

For all services in serving an attachment on property, or levying an execution, or executing an order of arrest, or order for the delivery of personal property, including all copies, one dollar.

For the expense in taking and keeping possession of or preserving property under attachment, execution, or other process, the same fees

and upon the same conditions as allowed to the sheriff.

For taking and receiving undertaking in any case in which he is authorized, one dollar.

For serving every notice, rule or order, besides mileage, including copy, one dollar.

For advertising any property for sale under execution, exclusive of costs of publication, one dollar.

For serving writ of possession, besides mileage, two dollars.

For all services in trial of right of property or damages, besides mile-

age, three dollars.

For commissions for receiving and paying over money on execution or other process where property has been levied on and sold, two per cent; when collected without sale, one per cent.

For mileage, the same as sheriff and under the same conditions.

For executing in duplicate a certificate of sale exclusive of the fee for filing, one dollar.

For drawing and executing a constable's deed, including acknowledgment, three dollars.

For making every arrest in a criminal proceeding, or executing a search warrant, besides mileage, one dollar and fifty cents.

For all services in summoning and taking charge of a jury, two dollars. For serving a subpoena, including copy on each person, besides mileage, twenty cents.

For every mile necessarily traveled in executing any warrant, serving subpoena, or taking a person before a magistrate or to jail, the same mileage as in civil actions, and under the same conditions, and in addition, in serving a subpoena or warrant when two or more persons are named in any warrant or subpoena, in the same or different actions in the hands of the officer, and such persons live in the same direction, but one mileage must be charged, as provided for the mileage of sheriffs in civil actions.

When two or more persons are brought before a magistrate or to jail at the same time, or might have been so brought, the officer must be allowed but one mileage.

For conveying a person when under arrest, the actual expense incurred in the transportation of such person must be allowed by the board of county commissioners, but the officer must pay his own expenses out of his mileage.

The total amount of fees allowed in criminal cases by the board of county commissioners must not exceed five hundred dollars (\$500.00) in any one year. The excess must be paid into the contingent fund of the county treasury.

That constables in townships having a population of twelve thousand (12,000) people and not exceeding twenty thousand (20,000) people, shall each receive a salary to be fixed by resolution of the county commissioners, but not to exceed \$900.00 per annum, payable monthly from the county treasury. Constables in townships having a population of more than twenty thousand (20,000) people shall each receive a salary to be fixed by resolution of the county commissioners, but not to exceed \$3,600.00 per annum, payable monthly from the county treasury, and constables in such townships where the population is twelve thousand (12,000) people and not more than thirty-five thousand (35,000) people shall receive no other fees for civil suits or criminal actions except mileage in the performance of their duties. Any such fees received by the constables shall be turned over to the county treasurer.

History: En. Sec. 4643, Pol. C. 1895; re-en. Sec. 3177, Rev. C. 1907; re-en. Sec. 4932, R. C. M. 1921; amd. Sec. 1, Ch. 152, L. 1935; amd. Sec. 1, Ch. 160, L. 1957; amd. Sec. 1, Ch. 278, L. 1967.

"Fees" Defined

The word "fees," as used in this section, refers to the charges of the constable, whether collectible from the county in criminal cases or from individuals in civil actions; it also refers to mileage as among

the "fees" of the constable. State v. Story, 53 M 573, 578, 165 P 748.

References

Wade v. Lewis and Clarke County, 24 M 335, 339, 61 P 879.

Collateral References

Sheriffs and Constables ≥28 et seq. 80 C.J.S. Sheriffs and Constables § 215 et seq.

CHAPTER 4

JURORS' AND WITNESSES' FEES

Section 25-401. Jurors' fees.

25-402. Jurors' fees-for what time paid.

25-403. Compensation of jurors in courts not of record and at coroner's inquests.

Witnesses' fees. 25-404.

25-405. Duties of clerk as to jurors.

25-406. Duties of clerk in reference to witnesses' certificate.

25-407. Statement of clerk to be sent to board of county commissioners. 25-408. Clerk must keep a record of witnesses in criminal actions.

25-409. Witnesses in courts not of record.

25-410. Witnesses in criminal actions or coroner's inquests. In civil actions must be paid by party subpoenaing. 25-411.

25-412. Witness may demand advance payment of fees in civil action.

Interpreters to be paid as witnesses.

25-413. Interpreters to be 25-414. Expert witnesses.

25-401. (4933) Jurors' fees. Grand and trial jurors shall receive ten dollars per day for attendance before any court of record and eight cents per mile each way for traveling from and to their residence and county seat. Any juror who is excused from attendance upon his own motion on the first day of his appearance in obedience to notice, or who has been summoned as a special juror and not sworn in the trial of the case, in the discretion of the court, may receive per diem and mileage.

History: En. Sec. 1, Ch. 48, L. 1903; re-en. Sec. 3178, Rev. C. 1907; amd. Sec. 1, Ch. 6, L. 1917; re-en. Sec. 4933, R. C. M. 1921; amd. Sec. 1, Ch. 18, L. 1935; amd. Sec. 1, Ch. 9, L. 1945; amd. Sec. 1, Ch. 117, L. 1963.

NOTE.—See section 59-801.

Wade v. Lewis and Clarke County, 24 M 335, 338, 61 P 879.

Collateral References Jury \$\infty 77 (1). 50 C.J.S. Juries § 207.

25-402. (4934) Jurors' fees—for what time paid. A juror must be paid for each day's attendance for the term or session for which he was summoned until excused. He must be paid for all Sundays and legal holidays unless he resides within ten miles from the courthouse, and all jurors residing within ten miles from the courthouse at which he is summoned to appear shall receive no compensation for Sundays or legal holidays, or for any days he may have been absent or excused from attending the court.

History: En. Sec. 2, p. 48, L. 1903; re-en. Sec. 3180, Rev. C. 1907; amd. Sec. 1, Ch. 23, L. 1913; re-en. Sec. 4934, R. C. M. 1921.

25-403. (4935) Compensation of jurors in courts not of record and at coroner's inquests. Jurors in courts not of record, in both civil and criminal actions, shall receive three dollars (\$3.00) per day, but in civil actions the jury must be paid by the party demanding the jury, and must be taxed as costs against the losing party. Jurors in coroner's inquest shall receive for their services the sum of three dollars (\$3.00) per day.

History: En. Sec. 4647, Pol. C. 1895; re-en. Sec. 3181, Rev. C. 1907; re-en. Sec. 4935, R. C. M. 1921; amd. Sec. 1, Ch. 206, L. 1947.

Jurors in courts not of record are not allowed to receive mileage. Wade v. Lewis and Clarke County, 24 M 335, 339, 61 P

25-404. (4936) Witnesses' fees. For attending in any civil or criminal action or proceeding before any court of record, referee, or officer authorized to take depositions, or commissioners to assess damages or otherwise, for each day, six dollars. For mileage in traveling to the place of trial or hearing, each way, for each mile, eight cents; provided, however, that no officer of the United States, the state of Montana, or of any county, incorporated city or town within the limits of the state of Montana shall receive any per diem when testifying in a criminal proceeding, and that no witness shall receive fees in any more than one criminal case on the same day.

History: En. Sec. 4648, Pol. C. 1895; re-en. Sec. 3182, Rev. C. 1907; re-en. Sec. 4936, R. C. M. 1921; amd. Sec. 2, Ch. 18, L. 1935; amd. Sec. 2, Ch. 117, L. 1963.

"Fees" Defined

The word "fees," as used in this section, refers to the per diem and mileage of witnesses. State v. Story, 53 M 573, 578, 165 P 748.

Mileage of Witnesses

A party to whom costs are awarded is entitled to mileage of witnesses who appeared and testified, although the record does not show that they were subpoenaed.
McGlaufin v. Wormser, 28 M 177, 182,
72 P 428. See also Lynes v. Northern
Pacific Ry. Co., 43 M 317, 330, 117 P 81.
Although witnesses are not obliged to

appear at a trial held out of the county in which they reside unless the distance is less than thirty miles, if such witnesses do appear, and the court finds that their testimony was necessary, they are entitled to mileage the same as witnesses who attend in the usual way. McGlaufin v. Wormser, 28 M 177, 182, 72 P 428; Great Falls Meat Co. v. Jenkins, 33 M 417, 422, 84 P 74. See also Lynes v. Northern Pacific Ry. Co., 43 M 317, 330, 117 P 81.

The mileage of his witnesses which a

successful party to an action may recover, under this section and section 93-8618, is not limited to travel from and to their place of residence; whether the mileage shall be computed from the place of residence will depend upon the circumstances of each case. Lynes v. Northern Pacific Ry. Co., 43 M 317, 330, 117 P 81. The mileage of witnesses in civil ac-

tions allowed litigants under this section is limited to travel within the state. Chilcott v. Rea, 52 M 134, 141, 155 P 1114.

An attorney, nonresident of Montana at the time he was subpoenaed as a witness for plaintiff in a suit to set aside a fraudulent default judgment, who had acted as plaintiff's counsel in the action out of which the equitable suit arose but was not representing him therein, was properly entitled to mileage from the state line to the place of trial and return, under this section. Bullard v. Zimmerman, 88 M 271, 281, 292 P 730.

Per Diem

A material witness who resided outside the county in which the case was tried at a distance greater than thirty miles and voluntarily attended the trial at the request of the prevailing party, and who, after his arrival on the day set for trial, had to wait for about a week before he was required to testify on account of congestion of court business, was entitled to per diem for the whole time he was in attendance and not only for the day on which he gave his testimony, as well as to mileage, the service of a subpoena not being a prerequisite to their allowance. Helena Adjustment Co. v. Claffin, 75 M 317, 326, 243 P 1063.

References

Wade v. Lewis and Clarke County, 24 M 335, 339, 61 P 879; Neary v. Northern Pacific Ry. Co., 41 M 480, 507, 110 P 226; Coolidge v. Meagher, 100 M 172, 182, 46 P 2d 684.

Collateral References

Witnesses 27, 29. 97 C.J.S. Witnesses §§ 35-48.

Right of witness detained in custody for future appearance to fees for such detention. 50 ALR 2d 1439.

25-405. (4937) Duties of clerk as to jurors. The clerk must give to each juror, at the time he is excused from further service, a certificate taken from a book containing a stub with a like designation, signed by himself under seal, in which must be stated the name of the juror, the number of days' attendance, the number of miles traveled, and the amount due, and on presentation of such certificate to the county treasurer, the amount specified in the certificate must be paid out of the general fund, and the clerk must make a detailed statement containing a list of the jurors, the amount of fees and mileage earned by each, and file the same with the clerk of the board of county commissioners on the first day of every regular meeting of the board, and no quarterly salary must be paid the clerk until such statement is filed. The board must examine such statement and see that it is correct. The clerk must keep a record of the attendance of jurors and compute the amount due for mileage, and the distance from any point to the county seat must be determined by the shortest traveled route.

History: En. Sec. 4645, Pol. C. 1895; re-en. Sec. 3179, Rev. C. 1907; re-en. Sec. 4937, R. C. M. 1921.

Omission of Seal from Juror's Certificate

A juror's certificate, which does not bear the seal required by this section, is void, and therefore not a subject of forgery. In re Farrell, 36 M 254, 266, 92 P 785, distinguished in 97 M 486, 497, 37 P 2d 322. See also County of Silver Bow v. Davies, 40 M 418, 425, 107 P 81, and American Bonding Co. v. State Savings Bank, 47 M 332, 337, 133 P 367; compare Choate v. Spencer, 13 M 127, 132, 32 P 651; Sharman v. Huot, 20 M 555, 557, 52 P 558; Kipp v. Burton, 29 M 96, 103, 74 P 85.

Payment of Jurors

This section is mandatory, both as to the duty of the clerk and of the treasurer; for the word "must" indicates that the duty of the clerk becomes imperative as soon as a juror is entitled to his pay. It also indicates that the duty of the treasurer is imperative as soon as a certificate, properly issued by the district court clerk, is presented to him. In re Farrell, 36 M 254, 261, 92 P 785. See County of Silver Bow v. Davies, 40 M 418, 426, 107 P 81.

This section does not require the certificates to be addressed to the treasurer; his duty requires him to pay upon their presentation. County of Silver Bow v. Davies,

40 M 418, 425, 107 P 81.

25-406. (4938) Duties of clerk in reference to witnesses' certificate. The witnesses in criminal actions must report their presence to the clerk the first day they attend under the subpoena, and at the time any witness is excused from further attendance the clerk must give to each witness a certificate taken from a book, containing a stub with like designations signed by the clerk, under seal, in which must be stated the name of the witness, the number of days in attendance, the number of miles traveled, and the amount due, and on presentation of such certificate to the county treasurer, the amount specified in the certificate must be paid out of the general fund.

History: En. Sec. 4649, Pol. C. 1895; re-en. Sec. 3183, Rev. C. 1907; re-en. Sec. 4938, R. C. M. 1921.

Issuance of Certificates

The clerk must observe the same formalities in issuing jurors' certificates as in issuing witnesses' certificates. County of Silver Bow v. Davies, 40 M 418, 425, 107 P 81.

Payment of Witnesses

This section does not require the certifi-

cates to be addressed to the treasurer; his duty requires him to pay upon their presentation. County of Silver Bow v. Davies, 40 M 418, 425, 107 P 81.

References

Griggs v. Glass, 58 M 476, 480, 193 P 564.

Collateral References

Witnesses \$32. 97 C.J.S. Witnesses § 44.

25-407. (4939) Statement of clerk to be sent to board of county commissioners. The clerk must make a detailed statement containing a list of the witnesses, the amount of fees and mileage earned by each, and file the same with the clerk of the board of county commissioners on the first day of every regular meeting of the board, and no quarterly salary must be

paid to the clerk until such statement is filed. The board must examine the statement and see that it is correct.

History: En. Sec. 4650, Pol. C. 1895; re-en. Sec. 3184, Rev. C. 1907; re-en. Sec. 4939, R. C. M. 1921.

"Fees" Defined

The word "fees," as used in this section, refers to the per diem and mileage of witnesses. State v. Story, 53 M 573, 578, 165 P 748.

25-408. (4940) Clerk must keep a record of witnesses in criminal actions. The clerk must keep a record of the attendance of witnesses in criminal cases, and compute the amount due them for mileage, and the distance from any point to the county seat must be determined by the shortest traveled route.

History: En. Sec. 4651, Pol. C. 1895; re-en. Sec. 3185, Rev. C. 1907; re-en. Sec. 4940, R. C. M. 1921.

Collateral References
Clerks of Courts 67.
14 C.J.S. Clerks of Courts § 38.

DECISIONS UNDER FORMER LAW

Mileage of Witnesses

Under section 1081, 5th Div. Comp. Stat. 1887, a witness would be allowed mileage only for the shortest route, al-

though it might appear that such was not the most convenient route. State ex rel. McMillan v. Ramsey, 11 M 245, 246, 28 P 258.

25-409. (4941) Witnesses in courts not of record. Witnesses in courts not of record in civil actions and proceedings shall receive one dollar and fifty cents for each day's actual attendance, and seven cents for each mile actually traveled in going from his residence by the usual traveled route to the said court and return.

History: En. Sec. 3, Ch. 48, L. 1903; re-en. Sec. 3186, Rev. C. 1907; re-en. Sec. 4941, R. C. M. 1921; amd. Sec. 3, Ch. 18, L. 1935.

Collateral References
Witnesses 27, 29.
97 C.J.S. Witnesses §§ 36, 43.

25-410. (4942) Witnesses in criminal actions or coroner's inquests. Witnesses in courts not of record in criminal actions and on coroner's inquests shall receive one dollar and fifty cents per day for actual attendance, and seven cents per mile for each mile actually and necessarily traveled from his place of residence to the said court and return.

History: En. Sec. 4, Ch. 48, L. 1903; 4942, R. C. M. 1921; amd. Sec. 4, Ch. 18, re-en. Sec. 3187, Rev. C. 1907; re-en. Sec. L. 1935.

25-411. (4943) In civil actions must be paid by party subpoenaing. The fees and compensation of a witness in all civil actions must be paid by the party who caused him to be subpoenaed.

History: En. Sec. 4654, Pol. C. 1895; re-en. Sec. 3188, Rev. C. 1907; re-en. Sec. 4943, R. C. M. 1921.

Collateral References Witnesses 30. 97 C.J.S. Witnesses § 35.

25-412. (4944) Witness may demand advance payment of fees in civil action. No witness shall be obliged to attend court, or before a referee, or any officer authorized to take depositions, or commissioner, when subpoenaed, unless his mileage and fees for one day's attendance are tendered or paid to him on his demanding the same, nor unless his fees for attendance thereafter for each day are tendered or paid to him on demand. The fees of witnesses paid may be taxed as costs against the losing party.

History: En. Sec. 4655, Pol. C. 1895; re-en. Sec. 3189, Rev. C. 1907; re-en. Sec. 4944, R. C. M. 1921; amd. Sec. 1, Ch. 71, L. 1927.

Only One Witness Fee Allowable to One Testifying Once under Stipulation Determining Three Cases

Where it was stipulated that determination of one of three cases involving the same nature of alleged wrong, but affecting different defendants, should determine the other two, and the witnesses testified but once, their testimony being used in all three cases, it was error to allow the witnesses fees for all three cases; but one fee should have been allowed to each. McKee v. Clark, 115 M 438, 444, 144 P 2d 1000, explained in 87 F Supp 374, 378.

Collateral References

Costs 184 (1); Witnesses 14. 20 C.J.S. Costs §§ 246, 247; 97 C.J.S. Witnesses § 45.

25-413. (4946) Interpreters to be paid as witnesses. Interpreters and translators must receive the same fees as witnesses.

History: En. Sec. 4657, Pol. C. 1895; re-en. Sec. 3191, Rev. C. 1907; re-en. Sec. 4946, R. C. M. 1921.

25-414. (4947) Expert witnesses. the same compensation as a witness.

History: En. Sec. 4658, Pol. C. 1895; re-en. Sec. 3192, Rev. C. 1907; re-en. Sec. 4947, R. C. M. 1921.

Exclusion of Fees from Costs

Expert witness fees are excluded from costs in a condemnation case. State v. Heltborg, 140 M 196, 369 P 2d 521, 525.

Collateral References Courts 56. 21 C.J.S. Courts § 141.

An expert is a witness and receives

Collateral References

Witnesses €= 28. 97 C.J.S. Witnesses § 42.

Amount of fees allowable to examiners of questioned documents or handwriting experts for serving and testifying. 86 ALR 2d 1283.

Fees for expert witness appointed by trial court in civil case. 95 ALR 2d 402.

CHAPTER 5

SALARIES OF STATE OFFICERS, DEPUTIES AND EMPLOYEES

Section 25-501. Salaries of elected state officials.

25-501.1. Salary to be for all services. 25-502. Repealed.

25-503. Repealed.

Salaries of janitors, watchmen, engineers, carpenter. 25-504.

25-505. Repealed.

Compensation of other officers, where prescribed. 25-506.

25-507. Salaries of officers, how paid.

Traveling expenses of officers attending conventions. 25-508.

25-509. Advancement of money on salaries—public officers.

Salaries of elected state officials. The annual salaries paid to 25-501. the various elected officials of the state of Montana shall be as follows:

Governor	\$23,250
Chief justice of the supreme court	\$18,500
Justices of the supreme court, each	\$17,000
Attorney general	\$15,500
State auditor	\$10,500
Superintendent of public instruction	\$13,750
Railroad commissioner	\$10,500
State treasurer	
Secretary of state	\$10,500
Clerk of the supreme court	\$ 9,000

History: En. Sec. 1, Ch. 202, L. 1959; amd. Sec. 2, Ch. 187, L. 1961; amd. Sec. 1, Ch. 212, L. 1963; amd. Sec. 1, Ch. 308, L. 1967.

Repeal

Former section 25-501 (Sec. 1, Ch. 182, L. 1949; Sec. 1, Ch. 237, L. 1955), relating to salaries of state officers, was repealed by Sec. 3, Ch. 202, Laws 1959. Section 1 of Ch. 202, Laws 1959 has been given the same section number and substituted therefor by the compiler.

Collateral References

Clerks of Courts 33; Judges 22 (5); Schools and School Districts 47; States 60.

14 C.J.S. Clerks of Courts § 24; 48 C.J.S. Judges § 36; 81 C.J.S. States § 89.

43 Am. Jur. 134, Public Officers, § 340.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements. 5 ALR 2d 1182.

25-501.1. Salary to be for all services. The salary of each such officer shall be for all services required of him or which may hereafter devolve upon him by law, including all services rendered ex officio as a member of any board, commission or committee, but shall not include actual necessary traveling, lodging and subsistence expenses incidental to his official duties; provided, however, that this provision shall not apply to the salary of the supervisor of the highway patrol so as to deprive him of his length-of-service salary increase as provided by section 31-105.

History: En. Sec. 2, Ch. 202, L. 1959; amd. Sec. 2, Ch. 187, L. 1961.

25-502, 25-503. (437, 438) Repealed—Chapter 202, Laws of 1959.

Reneal

These sections (Secs. 1, 2, Ch. 107, L. 1919; Sec. 2, Ch. 57, L. 1935), relating to the salaries of clerk of board of examiners,

state accountant and clerk of consolidated boards, were repealed by Sec. 3, Ch. 202, Laws 1959.

25-504. (439) Salaries of janitors, watchmen, engineers, carpenter. From and after the passage of this act, the salaries of janitors, watchmen, utility men, engineers, and the carpenter at the state capitol building and the powerhouse of the state capitol building at Helena, Montana, shall be fixed by the board of examiners of the state of Montana in its sound discretion.

History: En. Sec. 1, Ch. 71, L. 1919; re-en. Sec. 439, R. C. M. 1921; amd. Sec. 1, Ch. 124, L. 1925; amd. Sec. 1, Ch. 4, L. 1929; amd. Sec. 1, Ch. 43, L. 1943.

Amendment and Appropriation Bill Harmonized

After amending this section in 1943 to provide that the state board of examiners fix the salaries of the state capitol building employees, the legislature made appropriation "for salaries fixed by law"; in a proceeding in mandamus to compel approval and payment of salaries for the month of March, 1943, after the operative

date of the amendment, refused on the ground that the salary was not then "fixed by law," held, that the legislature intended the two bills to harmonize and to appropriate funds for the salaries, and omission to do so was an oversight, and the phrase "fixed by law" in the appropriation bill must necessarily be disregarded as surplusage. State ex rel. Ernest Krona v. Holmes, 114 M 372, 375, 136 P 2d 220.

Collateral References States \$\infty\$=61. 81 C.J.S. States \$ 91.

25-505. (440) Repealed—Chapter 202, Laws of 1959.

Repeal

This section (Sec. 1, Ch. 40, L. 1915), relating to the salaries of deputy state

officers and employees, was repealed by Sec. 3, Ch. 202, Laws 1959.

25-506. (441) Compensation of other officers, where prescribed. The compensation of all other officers and employees not specified in this chapter will be found under the laws regulating the several officers, boards, commissions and departments of the state.

History: En. Sec. 441, by recommendation of code commissioner of 1921.

25-507. (442) Salaries of officers, how paid. Unless otherwise provided by law the salaries of officers must be paid out of the general fund in the state treasury, monthly, on the last day of the month.

History: En. Sec. 1133, Pol. C. 1895; amd. Sec. 1, p. 114, L. 1901; re-en. Sec. 435, Rev. C. 1907; amd. Sec. 1, Ch. 107, L. 1917; re-en. Sec. 442, R. C. M. 1921.

Collateral References
Officers 101.
67 C.J.S. Officers § 99.

25-508. (443) Traveling expenses of officers attending conventions. (1) Hereafter no state, county, city or school district officer or employee of the state or of any county or city, or of any school district, shall receive payment from any public funds for traveling expenses or other expenses of any sort or kind for attendance upon any convention, meeting, or other gathering of public officers save and except for attendance upon such convention, meeting or other gatherings as said officer or employee may by virtue of his office find it necessary to attend, and provided further, that the board of trustees of any county or district high school or of any school district may by resolution adopted by a majority of the entire board make their district a member of any state association of school districts or school district trustees, or any other strictly educational association and authorize the payment of dues to such association, and the necessary traveling expenses of employees, or members of said board, to attend meetings of such association, or other meetings called for the express purpose of considering educational matters.

(2) Provided, further, three (3) members of the board of county commissioners may be allowed actual transportation expenses and per diem for attendance upon any general meeting of county commissioners or assessors held within the state not oftener than once a year and the proportionate expenses and charges against each county as a member of such association shall also be paid; provided also that county attorneys, sheriffs, and justices of the peace are hereby authorized to attend their respective meetings or conventions held within the state and are allowed actual traveling expenses not oftener than once a year for attending same.

(3) Provided, further, that nothing herein shall be construed to prevent any city or town council, commission or other governing body from paying membership fees and dues in any organization of city and town officials whose purpose is improvement of laws relating to city and town government and their better and more economical administration, and the necessary expense of any regular officer or employee of such city or town in attending any convention or meeting of such organization upon the direction of such council, commission, or other governing body by order upon its minutes stating that the public interest requires such attendance; such payment of membership fees, dues and/or expense to be made from such fund of the city or town as the council, commission or

other governing body shall direct by such order, upon claim presented, audited and allowed as are other claims against such city or town.

- (4) Provided, further, that all county clerk and recorders of the various counties throughout the state of Montana shall be allowed actual transportation expenses and per diem allowance for attendance upon any general meeting of the Montana association of county clerk and recorders held within the state not oftener than once a year, and the proportionate expenses and charges against each county as a member of such association shall be paid by such county.
- (5) Provided, further, that all county clerks of the district court of the various counties throughout the state of Montana shall be allowed actual transportation expenses and per diem allowance for attendance upon any general meeting of the Montana association of clerks of court held within the state, not oftener than once a year, and the proportionate expenses and charges against each county as a member of such association shall be paid by such county.

History: En. Sec. 1, Ch. 241, L. 1921; re-en. Sec. 443, R. C. M. 1921; amd. Sec. 1, Ch. 124, L. 1923; amd. Sec. 1, Ch. 48, L. 1927; amd. Sec. 1, Ch. 86, L. 1931; amd. Sec. 1, Ch. 130, L. 1933; amd. Sec. 1, Ch. 119, L. 1943; amd. Sec. 1, Ch. 58, L. 1949; amd. Sec. 1, Ch. 184, L. 1957; amd. Sec. 11, Ch. 80, L. 1961; amd. Sec. 1, Ch. 85, L. 1963; amd. Sec. 1, Ch. 79, L. 1965; amd. Sec. 1, Ch. 66, L. 1967; amd. Sec. 1, Ch. 174, L. 1967.

Compiler's Note

This section was amended twice in 1967. The two amendments, however, do not appear to conflict, so the compiler has made a composite section embodying the changes made by both 1967 amendatory acts.

State ex rel. King v. Smith, 98 M 171, 38 P 2d 274.

Collateral References

Counties 46; Municipal Corporations contries 40; Municipal Corporations 5163; Officers 99; Schools and School Districts 48 (5), 54; States 59.

20 C.J.S. Counties 79; 62 C.J.S. Municipal Corporations 535; 67 C.J.S. Officers

§ 91; 78 C.J.S. Schools and School Districts §§ 98, 118; 81 C.J.S. States § 92. 43 Am. Jur. 154, Public Officers, § 369.

Public officer's rights and duties in respect of mileage and other allowances incident to duties of his office but which represented no actual expense or outlay by him. 81 ALR 493.

25-509. Advancement of money on salaries—public officers. In any case where a public officer of this state is paid his salary quarterly under and by virtue of a provision of the constitution of the state of Montana, upon demand of any such officer, the state auditor of the state of Montana, or other disbursing officer, is authorized and directed to advance out of salary account such sum of money to such official, and to deduct same from his salary, as is equivalent to the salary that he would be entitled to receive if he were paid his salary monthly; provided that such advancement on account of salary earned shall not be made more often than once each month.

History: En. Sec. 1, Ch. 9, L. 1939.

Collateral References States 64. 81 C.J.S. States § 96.

CHAPTER 6

SALARIES OF COUNTY OFFICERS, DEPUTIES AND EMPLOYEES

Section 25-601. Payment of salaries of county officers and assistants.

25-602. Appointment of deputies-payment of salaries. 25-603. Compensation allowed deputies and assistants.

25-604. County commissioners to fix salaries of deputies-limitations.

Salaries of certain county officers. 25-605.

25-606. Repealed. 25-607. Repealed.

25-608. Salary of clerk of court and county auditor.

Salaries fixed by county commissioners in September of each election year—salaries not subject to change during entire term.

Existing officeholders to receive present salaries. Effective date—existing officeholders unaffected.

25-611.1. Effective date of 1953 amendment—existing officeholders unaffected.

(4868) Payment of salaries of county officers and assistants. 25-601. The salaries of the several county officers and their assistants must be paid monthly out of the general fund of the county, upon the order of the board of county commissioners, except the salary of the county attorney, which is payable monthly, one-half from the general fund of the county and the other one-half from the state treasury upon the warrant of the state auditor. The county commissioners of each county shall, within thirty (30) days after the election or appointment to fill a vacancy for any cause, of any county attorney, certify such election or appointment to the state auditor who shall thereafter draw warrants for such salaries in the same manner as for state officers. Provided, in case of a vacancy, the county commissioners shall immediately notify the state auditor, and the auditor shall compute the salaries due on the basis of said notification.

History: En. Sec. 4595, Pol. C. 1895; re-en. Sec. 3117, Rev. C. 1907; re-en. Sec. 4868, R. C. M. 1921; amd. Sec. 4, Ch. 141, L. 1925; amd. Sec. 1, Ch. 7, L. 1945.

Collateral References

Counties 75 (1).

20 C.J.S. Counties § 125. 43 Am. Jur. 134, Public Officers, § 340.

(4872) Appointment of deputies—payment of salaries. The number of deputies allowed to county officers and their compensation must not exceed the maximum limits prescribed in this chapter. Salaries must be allowed and paid monthly upon the order of the board of county commissioners, and paid out of the contingent fund.

History: En. Sec. 4603, Pol. C. 1895; re-en. Sec. 3136, Rev. C. 1907; re-en. Sec. 4872, R. C. M. 1921.

NOTE .- A portion of this section being no longer applicable was omitted from the code in 1921.

Deputy Sheriffs

The board of county commissioners has the power to determine, within the maximum limits prescribed by law, the number and compensation of deputies allowed by the sheriff. Jobb v. County of Meagher, 20 M 424, 431, 432, 51 P 1034, explained in 23 M 351, 356, 59 P 167; Hogan v. Cas-cade County, 36 M 183, 185, 92 P 529.

Penwell v. Board of County Commrs. of County of Lewis and Clarke, 23 M 351, 354, 59 P 167.

Collateral References

Counties \$\infty 62, 74 (6). 20 C.J.S. Counties §§ 101, 122.

25-603. (4873) Compensation allowed deputies and assistants. nual compensation allowed to any deputy or assistant is as follows:

Counties of the First Class.

Sheriff.

One undersheriff, at a rate of not less than twenty-six hundred dollars. One chief deputy and clerk, at a rate of not less than two thousand

All other deputies, at a rate of not less than eighteen hundred dollars.

Clerk and Recorder.

One chief deputy, at a rate of not less than twenty-one hundred dollars. All other deputies, at a rate of not less than sixteen hundred fifty dollars.

Clerk of District Court.

One chief deputy, at a rate of not less than nineteen hundred and fifty dollars.

Each department deputy clerk, at a rate of not less than eighteen hundred dollars.

All other deputies, at a rate of not less than sixteen hundred fifty dollars.

Treasurer.

One chief deputy, at a rate of not less than twenty-one hundred dollars. Other deputies, at a rate of not less than sixteen hundred fifty dollars.

Assessors.

One chief deputy, at a rate of not less than twenty-one hundred dollars. Other deputies, between first Monday of March and August of each year, at a rate of not less than one hundred and fifty dollars per month.

County Attorney.

Chief deputy, at a rate of not less than twenty-four hundred dollars. Other deputies, at a rate of not less than eighteen hundred dollars.

Auditor.

One chief deputy, at a rate of not less than eighteen hundred dollars. Other deputies, at a rate of not less than sixteen hundred fifty dollars.

Counties of the Second and Third Classes.

County Attorney.

Chief deputy, at a rate of not less than twenty-one hundred dollars.

Other deputies, at a rate of not less than eighteen hundred dollars.

Undersheriff, at a rate of not less than nineteen hundred fifty dollars. Each deputy sheriff, at a rate of not less than eighteen hundred dollars.

Chief deputy clerk of the district court, at a rate of not less than nineteen hundred fifty dollars.

Other deputy clerks of the district court, at a rate of not less than eighteen hundred dollars.

Chief deputy treasurer, at a rate of not less than nineteen hundred fifty dollars.

Each deputy treasurer, at a rate of not less than sixteen hundred fifty dollars.

Chief deputy clerk and recorder, at a rate of not less than nineteen hundred fifty dollars.

Each deputy clerk and recorder, at a rate of not less than sixteen hundred fifty dollars.

Chief deputy assessor, at a rate of not less than nineteen hundred fifty dollars.

Each deputy assessor or assistant assessor, at a rate of not less than sixteen hundred fifty dollars.

Each deputy auditor, at a rate of not less than sixteen hundred fifty dollars.

Counties of the Fourth and Fifth Classes.

Undersheriff, at a rate of not less than nineteen hundred fifty dollars. Each deputy sheriff and jailor, at a rate of not less than sixteen hundred fifty dollars.

Deputy clerks and recorder, at a rate of not less than sixteen hundred fifty dollars.

Deputy clerks of the district court, at a rate of not less than sixteen hundred fifty dollars.

Deputy treasurer and deputy assessor allowed by law, at a rate of not less than sixteen hundred fifty dollars.

Counties of the Sixth and Seventh Classes.

Undersheriff, at a rate of not less than eighteen hundred dollars.

Each deputy sheriff, at a rate of not less than sixteen hundred fifty dollars.

Deputy clerks and recorder, at a rate of not less than sixteen hundred fifty dollars.

Deputy clerks of the district court, at a rate of not less than sixteen hundred fifty dollars.

Each deputy treasurer and deputy assessor or assistant assessor allowed by law, at a rate of not less than sixteen hundred fifty dollars.

History: En. Sec. 3118, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1909; amd. Sec. 1, Ch. 132, L. 1911; amd. Sec. 1, Ch. 222, L. 1919; re-en. Sec. 4873, R. C. M. 1921.

NOTE.—The operation of this section

is affected by section 25-604.

NOTE.—This section held governed by section 25-604 (4874) as amended by Ch. 82, Laws 1923, as to the compensation that may be fixed by the county commissioners for temporary deputy county officers. Opinions of Attorney General Vol. 12, p. 137.

References

Jobb v. County of Meagher, 20 M 424,

430, 51 P 1034; Penwell v. Board of County Commrs. of County of Lewis and Clarke, 23 M 351, 352, 59 P 167; Hogan v. Cascade County, 36 M 183, 186, 92 P 529; Farrell v. Yellowstone County, 68 M 313, 218 P 559; Adami v. County of Lewis and Clark, 114 M 557, 560, 138 P 2d 969; State ex rel. Thompson v. Gallatin County, 120 M 263, 184 P 2d 998, 1001; Kelly v. Silver Bow County, 125 M 272, 233 P 2d 1035, 1036.

Collateral References Counties 74 (1-6). 20 C.J.S. Counties 115-122.

(4874) County commissioners to fix salaries of deputies—limitations. That the boards of county commissioners in the several counties in the state shall have the power to fix the compensation allowed any deputy or assistant mentioned in the preceding section except as herein provided; provided the salary of no deputy or assistant shall be more than ninety per cent (90%) of the salary of the officer under whom such deputy or assistant is serving; except as herein provided; where any deputy or assistant is employed for a period of less than one (1) year the compensation of such deputy or assistant shall be for the time so employed; provided, the rate of such compensation shall not be in excess of the rates now provided by law for similar deputies and assistants, except as herein provided; said boards of county commissioners shall likewise have the power to fix and determine the number of deputy county officers and allow to the several county officers a greater or less number of deputies or assistants, than the maximum number allowed by law, when in the judgment of the board of county commissioners such greater or less number of

deputies is or is not needed for the faithful and prompt discharge of the duties of any county office; provided that after this act becomes effective the maximum salary rate per month of any deputy or assistant should not be less than the maximum salary allowed in any month of the year immediately previous to the date this act becomes effective. In fixing the compensation allowed the undersheriff the board must fix the same at ninety-five per cent (95%) of the salary of the officers under whom such undersheriff is serving; in fixing the compensation allowed the deputy sheriffs the board must fix the same at ninety per cent (90%) of the salary of the officer under whom such deputy sheriff is serving.

History: En. Sec. 2, Ch. 222, L. 1919; amd. Sec. 1, Ch. 204, L. 1921; re-en. Sec. 4874, R. C. M. 1921; amd. Sec. 1, Ch. 82, L. 1923; amd. Sec. 1, Ch. 87, L. 1943; amd. Sec. 1, Ch. 151, L. 1945; amd. Sec. 1, Ch. 47, L. 1947; amd. Sec. 1, Ch. 136, L. 1951. NOTE.—See Jobb v. County of Meagher,

NOTE.—See Jobb v. County of Meagher, 20 M 424, 51 P 1034, for history of earlier acts.

Extra Deputies-Temporary Service

While the board of county commissioners has no power to decrease the compensation of regular deputies of county officers fixed by section 25-603, it has discretion, under this section, to fix the compensation of extra deputies appointed for temporary service, at any rate it may deem expedient, provided it does not exceel the rate paid the regular deputies. Modesitt v. Flathead County, 57 M 216, 187 P 911. See also Farrell v. Yellowstone County, 68 M 313, 218 P 559.

Fixing Compensation

Board of county commissioners may exercise its statutory power to fix the compensation of deputies and assistants in the county offices by providing for such compensation in the annual budget. State ex rel. Thompson v. Gallatin County, 120 M 263, 184 P 24 998, 1001.

ex rel. Thompson v. Gallatin County, 120 M 263, 184 P 2d 998, 1001.

Designation of compensation in the budget is not the only way in which the board of county commissioners can exercise its power to fix salaries but the board can fix such salaries by minute entry, motion, or in any of the ways employed before passage of the Budget Act. State ex

rel. Thompson v. Gallatin County, 120 M 263, 184 P 2d 998, 1002.

Where board of county commissioners appropriated funds for office at rate of \$170 per month but in their journal stated that the salary for the office was fixed by the board at \$150 per month, the salary for the office was \$150 per month. State ex rel. Thompson v. Gallatin County, 120 M 263, 184 P 2d 998, 1003.

Salary for Time Not Served

Where deputy sheriff did not serve for three months because of illness, the county commissioners could not be forced to pay him his salary for those three months. State ex rel. Rusch v. Board of County Commrs. of Yellowstone County, 121 M 162, 191 P 2d 670, 673.

Transfer of Official Duties

If the services the county commissioners seek to have done involve only an investigation of county offices for abstracting purposes, that can be done by a regularly appointed deputy county officer; and there is no statutory authority for the county commissioners to employ anyone to perform the services on a commission basis. Kelly v. Silver Bow County, 125 M 272, 233 P 2d 1035, 1036.

References

State v. Crouch, 70 M 551, 554, 227 P 818.

Collateral References

Counties 51, 74 (6). 20 C.J.S. Counties §§ 100, 122.

DECISIONS UNDER FORMER LAW

Constitutionality of Increase of Salaries

The 1943 amendment to this section permitting a 12½ per cent increase in the maximum salaries of deputy and assistant county officials, is not in conflict with section 31, article V of the constitution since the officers affected are not "public officers" (meaning officers having a fixed

and definite term) but hold at the pleasure of the appointing power; held also not to offend against section 26 of the same article prohibiting enactment of special laws, since it is a law of general operation. Adami v. County of Lewis and Clark, 114 M 557, 559, 138 P 2d 969.

25-605. Salaries of certain county officers. The salaries of county treasurers, clerk and recorder, clerk of the court, county attorneys, sheriffs,

county assessors, county superintendents of schools, and of county surveyors in counties where county surveyors now receive salaries as provided in section 32-303, shall be based on the population and taxable valuation of the county in accordance with the following schedule:

Donulation	Ω-1		
Population of County	Salary	Taxable Valuation	Salary
· ·	Coi. A	of County	Col. B
Below 3,000	\$2,320	Below \$2,000,000	\$2,320
	 2, 380	\$ 2,000,000 to 2,999,999	2,380
	2,44 0	3,000,000 to 3,999,999	2,440
	2,490	4,000,000 to 4,999,999	2,490
6,000 to 6,999	2,550	5,000,000 to 5,999,999	2,550
7,000 to 7,999	2,720	6,000,000 to 6,999,999	2,720
8,000 to 8,999	2,770	7,000,000 to 7,999,999	2,770
9,000 to 9,999	2,830	8,000,000 to 9,999,999	2,830
, , , , , , , , , , , , , , , , , , , ,	2,880	10,000,000 to 11,999,999	2,880
	2,940	12,000,000 to 13,999,999	2,940
	3,000	14,000,000 to 15,999,999	3,000
	3,050	16,000,000 to 17,999,999	3,050
20,000 to 24,999	3,110	18,000,000 to 19,999,999	3,110
	3,160	20,000,000 to 22,499,999	3,160
30,000 to 39,999	3,220	22,500,000 to 24,999,999	3,220
40,000 to 49,999	3,300	25,000,000 to 29,999,999	3,300
50,000 to 59,999	3,420	30,000,000 to 34,999,999	3,420
60,000 to 69,999	3,530	35,000,000 to 39,999,999	3,530
70,000 to 79,999	3,640	40,000,000 to 44,999,999	3,640
80,000 to 89,999	3,750	45,000,000 to 49,999,999	3,750
90,000 to 99,999	3,860	50,000,000 to 54,999,999	3,860
100,000 and over	3,980	55,000,000 to 59,999,999	3,980
		60,000,000 to 64,999,999	3,980
		65,000,000 to 69,999,999	3,980
		70,000,000 to 74,999,999	3,980
		75,000,000 to 79,999,999	3,980

The total salary paid to county treasurers, clerk and recorder, clerk of the court, county attorneys, sheriffs, county assessors, county superintendents of schools, and county surveyors in counties where county surveyors receive salaries, as provided in section 32-303, shall be the sum of the salary shown in column A based on population when added to the salary shown in column B based on taxable valuation; provided, however, that county superintendents of schools shall receive, in addition to the salary based upon the totals of columns A and B above, the sum of four hundred dollars (\$400) per year.

History: En. Sec. 1, Ch. 150, L. 1945; amd. Sec. 1, Ch. 177, L. 1949; amd. Sec. 1, Ch. 118, L. 1951; amd. Sec. 1, Ch. 222, L. 1953; amd. Sec. 1, Ch. 22, L. 1957; amd. Sec. 1, Ch. 66, L. 1959; amd. Sec. 1, Ch. 195, L. 1961; amd. Sec. 1, Ch. 216, L. 1965; amd. Sec. 1, Ch. 231, L. 1967.

Compiler's Notes

The title of Ch. 118, Laws 1951 stated

that it was amending section 1 of chapter 177 of the Laws of 1949 and the introductory clause read "That Chapter 177 of the Laws of 1949, be, and the same hereby is amended to read as follows:" then followed the text of this section only. Section 1 of Ch. 177, Laws 1949 also contained the provisions now in sections 25-608 and 25-609, although it would seem

apparent that there was no intention to affect such sections.

Section 32-203, referred to in this section, was repealed by Sec. 12-109, Ch. 197, Laws 1965.

25-606, 25-607. Repealed—Chapter 22, Laws of 1957.

Repeal

These sections (Secs. 2, 3, Ch. 150, L. 1945; Sec. 1, Ch. 177, L. 1949; Secs. 2, 3,

Ch. 222, L. 1953), relating to the salary of sheriff and county attorney, were repealed by Sec. 2, Ch. 22, Laws 1957.

25-608. Salary of clerk of court and county auditor. The salary of the clerk of the district court shall be the same as that paid to the county treasurer. The salary of the county auditor, in all counties wherein such office is authorized shall be the same as that paid to the county treasurer.

History: En. Sec. 4, Ch. 150, L. 1945, amd. Sec. 1, Ch. 91, L. 1947; amd. Sec. 1, Ch. 177, L. 1949.

Collateral References Counties 74 (2), (4). 20 C.J.S. Counties §§ 116, 117.

Cross-Reference

See compiler's note to section 25-605.

25-609. Salaries fixed by county commissioners in September of each election year—salaries not subject to change during entire term. In September of any year in which the county treasurer, county clerk, county assessor, county school superintendent, county sheriff, county attorney, or clerk of the district court is to be elected, the county commissioners shall, by resolution, fix the salaries of the officials to be elected in conformity with the schedule in section 25-605, based on the population as shown in the last decennial federal census and on the taxable valuation of the county at the time the salaries are fixed. When so fixed, the salaries shall not be changed during the entire term for which such officials are elected regardless of any change in population or taxable valuation of the county during such term. If a vacancy occurs in any office, the person who is appointed or elected to fill the unexpired term in the office vacated shall receive the same salary as the person vacating the office.

History: En. Sec. 5, Ch. 150, L. 1945; amd. Sec. 1, Ch. 177, L. 1949; amd. Sec. 4, Ch. 222, L. 1953; amd. Sec. 1, Ch. 98, L. 1963.

Cross-Reference See compiler's note to section 25-605.

25-610. Existing officeholders to receive present salaries. This act shall be in full force and effect on and after July 1, 1945, but shall not in any manner affect the salaries of those county officers who are in office at the date such act goes into effect, such officers being entitled to the same salaries they are receiving at the date this act takes effect for the remainder of the terms for which they were elected.

History: En. Sec. 7, Ch. 150, L. 1945.

Compiler's Note

The amending clause of Sec. 1, Ch. 177, Laws of 1949 read: "That Chapter 150 of the laws of 1945, as amended by Chapter 91 of the laws of 1947, be, and the same is hereby amended to read as follows:" and then followed sections 1 to 5. The omission of section 7 from such amendatory act may have effected a repeal of this section.

25-611. Effective date—existing officeholders unaffected. This act shall be in full force and effect from and after its passage and approval, but nothing contained herein shall be construed to or shall in any manner effect an increase of the salary or emolument of any of the public officers listed

in sections 25-605 to 25-609 who are in office at the date this act goes into effect, such officers being entitled to the same salaries they are receiving at the date this act takes effect for the remainder of the terms for which they were elected. If a vacancy occasioned by death, resignation, or otherwise, should occur in any of the public offices listed in sections 25-605 to 25-609 after this act takes effect, the person elected or appointed to fill such vacancy shall be entitled to receive the salary therefor set out in sections 25-605 to 25-609.

History: En. Sec. 2, Ch. 177, L. 1949.

Compiler's Note

Sections 25-606 and 25-607, included in

the references to sections 25-605 to 25-609 in this section, were repealed by Sec. 2, Ch. 22, Laws 1957.

25-611.1. Effective date of 1953 amendment—existing officeholders unaffected. This act shall be in full force and effect from and after its passage and approval, but nothing contained herein shall be construed to or shall in any manner effect an increase of the salary or emolument of any of the public officers hereinbefore mentioned who are in office at the date this act goes into effect, such officers being entitled to the same salaries they are receiving at the date this act takes effect for the remainder of the terms for which they are elected.

History: En. Sec. 5, Ch. 222, L. 1953.

sections 25-605 and 25-609, became effective when approved March 5, 1953.

Compiler's Note

Chapter 222 of Laws 1953, compiled as

TITLE 26

FISH AND GAME

Chapter 1. Fish and game commission, director and wardens—creation—powers and duties, 26-101 to 26-136.

Fishing and hunting licenses, 26-201 to 26-228.

Restrictions on taking fish and game-open and closed seasons, 26-301 to

- Beaver—trapping—license—protection, 26-401, 26-402.
 Protection of certain wild birds—sale of confiscated birds and animals, 26-501 to 26-512.
- Power of commission to dispose of game animals damaging property and oversupply of fish in Lake county, Repealed—Section 8, Chapter 20, Laws of 1953; Section 2, Chapter 157, Laws of 1955; Section 1, Chapter 185, Laws of 1955.
- Shipment of animals from state, 26-701 to 26-708.

Miscellaneous prohibitions, 26-801 to 26-811.

- Outfitter's license—taxidermist's license, 26-901 to 26-907.
- 10. Disposal of fines—duties of courts—exceptions from act, 26-1001 to 26-1008.

Game preserves, migratory bird reservations, 26-1101 to 26-1127. 11.

12. Permits for breeding game birds and animals—other regulations, 26-1201 to 26-1204.

13. Fur dealer's license and regulation, 26-1301 to 26-1306.

14. Fish restoration and management projects, 26-1401 to 26-1403.

15. Construction and hydraulic projects affecting fish and game, 26-1501 to 26-1507.

16. Shooting preserves, 26-1601 to 26-1614.

CHAPTER 1

FISH AND GAME COMMISSION, DIRECTOR AND WARDENS-CREATION-POWERS AND DUTIES

Section 26-101. Creation of state fish and game commission.

26-102. Districts for appointment of members of commission.

26-103. Meetings.

Powers and duties of commission.

26-104.1. Repealed.

26-105. Compensation of commissioners.

26-105.1. Budget Act inapplicable.

26-106. State fish and game director—qualifications—powers—duties.

26-106.1. State fish and game warden designated state fish and game directordeputy fish and game wardens designated state fish and game wardens.

26-106.2. Application of change of name.

State fish and game wardens—appointment—qualifications. Employees of the commission—removal—rating—salaries—expenses. 26-108.

26-109. Political activity prohibited.

26-110. Qualifications, powers and duties of game wardens. 26-111. Oath of state fish and game director and wardens.

26-112. Repealed.

26-113. Repealed.

26-114. Appointment of ex officio state fish and game wardens.

26-115. Superintendent of state fisheries-appointment.

26-116. Superintendent of state fisheries-salary.

Powers and duties of superintendent of state fisheries. 26-117.

26-118. State fish and game commission to control state waters for propagation of fish.

26-119. State fish and game commission shall procure plans for buildings.

26-120. Transfer of funds.

26-121. State fish and game moneys.

26-122. Repealed.

26-123. Salaries, per diem and expenses, how paid.26-124. Reports of state fish and game director.

26-125. Publication of laws.

26-126. Duty of attorney general to advise commissioners—prosecuting attorneys to prosecute complaints.

26-127. Creating fish and game preserves, refuges, sanctuaries, rest grounds, closed districts and closed seasons.

26-128. Posting and publication of orders, rules and regulations of commission.

26-129. Effect of orders, rules and regulations.

26-130. Repealed.

26-131. Preamble concerning Indian treaty of 1855.

26-132. Authority for commission to make agreement with Indians concerning hunting and fishing.

26-133. Payments to counties for department owned land-exceptions.

26-134. Allocation of funds to school districts.

26-135. Wild animals damaging property—investigation—special season—destruction by commission—allowing holders of property to kill.

26-136. Meat of wild animals so killed—disposition.

26-101. (3650) Creation of state fish and game commission. There is hereby created for the state of Montana, a state fish and game commission, which shall consist and be composed of five (5) members, who shall be appointed and who shall hold office in accordance with the provisions of this act, and who shall have the powers and duties prescribed by law. The commission created hereby shall be known as the state fish and game commission and the members thereof as the state fish and game commissioners.

History: Earlier acts creating fish and game commissions were Ch. 176, L. 1907; Sec. 1980 et seq., Rev. C. 1907; amd. Sec. 1, Ch. 18, L. 1911; amd. Sec. 8, Ch. 173, L. 1917. This section En. Sec. 1, Ch. 193, L. 1921; re-en. Sec. 3650, R. C. M. 1921; amd. Sec. 1, Ch. 166, L. 1941.

References

State ex rel. Nagle v. Sullivan, 98 M 425, 40 P 2d 995.

Collateral References

Fish 11; Game 6.

36A C.J.S. Fish § 37; 38 C.J.S. Game § 9. 22 Am. Jur. 696, Fish and Fisheries, § 40; 24 Am. Jur. 381, Game and Game Laws, § 10.

Power of game or fish commission to open or close season. 34 ALR 832.

26-102. (3651) **Districts for appointment of members of commission.** (1) The state of Montana is hereby divided into the following districts and the counties composing each district are as follows:

District No. 1. Lincoln, Flathead, Sanders, Lake, Mineral, Missoula, Powell, Ravalli, Granite, and Lewis and Clark.

District No. 2. Deer Lodge, Silver Bow, Beaverhead, Madison, Jefferson, Broadwater, Gallatin, Park and Sweetgrass.

District No. 3. Glacier, Toole, Liberty, Hill, Pondera, Teton, Chouteau, Cascade, Judith Basin, Fergus, Blaine, Meagher and Wheatland.

District No. 4. Phillips, Valley, Daniels, Sheridan, Roosevelt, Petroleum, Garfield, McCone, Richland, Dawson, Wibaux.

District No. 5. Golden Valley, Musselshell, Stillwater, Carbon, Yellowstone, Big Horn, Treasure, Rosebud, Custer, Powder River, Carter, Fallon, Prairie.

(2) One member of the commission shall be appointed from each of the foregoing districts by the governor of the state of Montana with the consent of the senate. In each year when there is an appointment, it shall be made by the first day of February. The selection of said members shall be made without regard to political affiliation but for the sole welfare of the fish and game and wildlife of the state. No person shall be appointed a member of said commission unless he shall be informed or interested and experienced in the subject of wildlife, fish and game, and the requirements for the conservation and protection of fish, game, and game birds and animals.

- (3) The first fish and game commissioners appointed in districts 1, and 5 shall each hold office for a term of four (4) years; the first commissioners appointed in districts 2 and 4 shall each hold office for a term of three (3) years; the first fish and game commissioner appointed in district 3 shall hold office for a term of two (2) years, and thereafter the term of office of each fish and game commissioner shall be four (4) years.
- (4) The governor may remove any fish and game commissioner for inefficiency, neglect of duty, or misconduct in office, or for cause by delivering to him a copy of the charges and affording him an opportunity of being publicly heard in person or by counsel in his own defense, upon not less than fifteen (15) days' notice in writing accompanied by a statement of the charges held against him.
- (5) Vacancies occurring in the fish and game commission shall be filled by the governor with the consent of the senate in the same manner and from the districts in which such vacancies occur.

History: En. Sec. 2, Ch. 193, L. 1921; re-en. Sec. 3651, R. C. M. 1921; amd. Sec. 2, Ch. 166, L. 1941; amd. Sec. 1, Ch. 29, L. 1965; amd. Sec. 46, Ch. 177, L. 1965.

Compiler's Note

This section was amended twice in 1965,

once by Ch. 29 and once by Ch. 177. Neither amendatory act mentioned nor incorporated the changes made by the other. Since the two acts do not appear to conflict, the compiler has made a composite section incorporating the changes made by both amendatory acts.

DECISIONS UNDER FORMER LAW

Removal of Commissioners

Prior to the enactment of chapter 193, Laws of 1921 (26-101 et seq.), members of the fish and game commission appointed by the governor were, under the laws applicable, removable for cause after notice and hearing. By that chapter the legislature, after providing that the terms of the commissioners shall be four years, declared that they should be removable "for cause or the good of the commission." State ex rel. Nagle v. Sullivan, 98 M 425, 443, 40 P 2d 995, 99 ALR 321, explained in 139 M 384, 389, 365 P 2d 942.

Under this section, prior to 1941 amendment, providing for removal of fish and game commissioners "for cause or the good of the commission," the governor did not have the power and authority to remove

a commissioner without notice and hearing. State ex rel. Nagle v. Sullivan, 98 M 425, 443, 40 P 2d 995, 99 ALR 321, explained in 139 M 384, 389, 365 P 2d 942.

Whenever the charges on which a fish and game commissioner is sought to be removed involve malfeasance, misfeasance or nonfeasance in office, or directly reflect upon the official or personal integrity of the incumbent proposed to be removed, the provisions of this section, prior to 1941 amendment, required that the incumbent be given notice and an opportunity to meet the charges. Where these requirements were not met the removal of the incumbent was illegal. State ex rel. Nagle v. Sullivan, 98 M 425, 443, 40 P 2d 995, 99 ALR 321.

26-103. (3652) Meetings. The members of the commission shall within thirty (30) days after their appointment and annually thereafter meet and organize by electing from its membership a chairman and shall hold quarterly or other meetings for the transaction of business, at such

times and places it may deem necessary and proper, said meetings to be called by the chairman, or by a majority of the commission, and to be held at the time and place specified in the call for the same. A majority of the members of the commission shall constitute a quorum for the transaction of any business which may come before it. The said commission shall keep a record of all the business transacted by it. The chairman and secretary, hereinafter designated, shall sign all orders, minutes or documents for the commission. The principal offices of the commission shall be located near the capitol building in Helena, and suitable and adequate rooms therefor, together with janitor services, light, heat and water shall be furnished by the state of Montana, rental shall be charged at two dollars (\$2.00) per square foot per year for the total space occupied. Such charge to the commission shall be in effect until such time as the commission shall provide other building or buildings. Such rental collected shall be deposited to the credit of the state general fund.

History: En. Sec. 3, Ch. 193, L. 1921; amd. Sec. 1, Ch. 52, L. 1957; amd. Sec. 1, re-en. Sec. 3652, R. C. M. 1921; amd. Sec. 1, Ch. 119, L. 1959; amd. Sec. 23, Ch. 271, L. 1, Ch. 77, L. 1923; amd. Sec. 1, Ch. 192, 1963.

L. 1925; amd. Sec. 1, Ch. 114, L. 1945;

- 26-104. (3653) Powers and duties of commission. (1) The commission hereby created shall have supervision over all the wildlife, fish, game, and nongame birds, and waterfowl, and the game, and fur-bearing animals of the state, and shall possess all powers necessary to fulfill the duties prescribed by law with respect thereto, and to bring actions in the proper courts of this state for the enforcement of the fish and game laws of the state, and the orders, rules and regulations adopted and promulgated by the commission.
- (2) It shall have full power and authority to enforce all the laws of the state of Montana, respecting the protection, preservation and propagation of fish, game, and fur-bearing animals, game and nongame birds, within the state.
- (3) It shall have the exclusive power to expend for the protection, preservation and propagation of fish, game, and fur-bearing animals, and game and nongame birds, all funds of the state of Montana collected or acquired for that purpose, whether arising from state appropriation, licenses, fines, gifts, or otherwise, all sums collected or received from the sale of hunting and fishing licenses or permits, from the sale of seized game or hides, or from fines, damages collected for violations of the fish and game laws of this state, from appropriations, or received by the commission from any other sources are hereby appropriated to and placed under control of the Montana fish and game commission.
- (4) It shall have power to discharge any appointee or employee of such commission for cause at any time.
- (5) It shall have full power and authority to dispose of all property owned by the state of Montana, used for the protection, preservation and propagation of fish, game, and fur-bearing animals, and game and nongame birds, which shall have been found to be of no further value or use to the state, and shall turn over proceeds arising therefrom to the state treasurer to be by him credited to the state fish and game fund.

- (6) It shall have full power and authority to use so much of the fish and game funds of the state as may be necessary for the construction, maintenance, operation, upkeep, and repair of fish hatcheries, game farms or other property or means and appliances for the protection and propagation of fish, game and fur-bearing animals, or game or nongame birds in the state of Montana, and it shall have the authority to appropriate moneys from the funds at its disposal for the extermination or eradication of predatory animals that destroy fish, game, or fur-bearing animals, or game or nongame birds.
- (7) It shall have authority to provide for the importation of game birds and game and fur-bearing animals, and for the protection, propagation, and distribution of such imported or native birds and animals.
- (8) It shall have authority to spend so much of the state fish and game funds as may be necessary to introduce and propagate wild waterfowl food and for that purpose may secure expert advice as to what kinds of waterfowl foods are adapted to the climate, soil, and waters of this state.
- (9) It shall be its duty to furnish plans for, and to direct and compel the construction and installation and repair of fish ladders upon dams and other obstructions in streams, which, however, shall be installed and maintained at the expense of the owners of said dam or other obstruction.
- (10) It shall have the authority to purchase and maintain at the expense of the state fish and game fund suitable fish screens or fish wheels, or other devices, to install in irrigating ditches to prevent fish entering said ditches.
- (11) It shall have authority to locate, lay out, construct and maintain nurseries and rearing ponds where fry can be planted, propagated and reared and when of suitable sizes, liberated and distributed in the waters of this state, and may expend from the state fish and game funds such sums as may be necessary for this purpose.
- (12) It shall have authority to acquire by gift, purchase, capture, or otherwise, any fish, game, game birds, or animals, for propagation, experimental or scientific purposes.
- (13) It shall have authority to acquire by purchase, condemnation, lease, agreement, gift, or devise, or to acquire easements upon, lands or waters suitable for the purposes hereinafter enumerated, and develop, operate and maintain the same for said purposes: (a) For fish hatcheries, nursery ponds, or game farms; (b) Lands or waters suitable for game. bird, fish, or fur-bearing animal restoration, propagation, or protection; (c) For public hunting, fishing, or trapping areas to provide places where the public may hunt, trap, or fish in accordance with the provisions of law or the regulations of the commission; (d) To extend and consolidate by exchange lands or waters suitable for the above purposes; (e) To capture, propagate, transport, buy, sell, or exchange any species of game, bird, fish, fish eggs, or fur-bearing animals needed for propagation or stocking purposes, or to exercise control measures of undesirable species. It shall further have full authority to dispose of lands and waters acquired by it on such terms after such public notice, and without regard to other laws of this state which provide for sale or disposal of state lands, and with or

without reservation, as it deems necessary and advisable, provided that notice of sale describing the lands or waters to be disposed of shall be published once a week for three (3) successive weeks in a newspaper with general circulation printed and published in the county wherein the lands or waters are situated, or if no newspaper be printed and published in such county then in any newspaper with general circulation in such county, advertising for cash bids to be presented to the commission or its director within thirty (30) days from the date of the first publication, each bid to be accompanied by a cashiers check or cash deposit in an amount equal to ten per cent (10%) of the amount bid; the highest bid shall be accepted upon payment of the balance due within ten (10) days after mailing notice by registered mail to the highest bidder; if such bidder shall default on payment of the balance due, then the next highest bidders shall be similarly notified in succession until a sale is completed; thereupon deposits shall be returned to the unsuccessful bidders except bidders defaulting after notification; the commission shall reserve the right to reject any or all bids which do not equal or exceed the full market value of such lands and waters as determined by the commission; the commission shall convey such lands and waters by deed without covenants of warranty, executed by the governor, or in his absence or disability by the lieutenant governor, attested by the secretary of state, and further countersigned by the chairman of the state fish and game commission, attested by the secretary of the commission, and have the great seal of the state of Montana and the seal of the state fish and game commission thereto affixed, but need not be acknowledged.

- (14) It shall have authority to enter into co-operative agreements with educational institutions and state, federal, or other agencies, to promote wildlife research and to train men for wildlife management. It shall have authority to enter into co-operative agreements with federal agencies, municipalities, corporations, organized groups of landowners, associations and individuals for the development of game, bird, fish, or fur-bearing animal management and demonstration projects.
- (15) It shall have authority to fix seasons, bag limits, possession limits and season limits; to open or close, shorten or lengthen seasons on any species of game, bird, fish or fur-bearing animal as defined by section 26-201, and to declare areas open to the hunting of deer, antelope and elk by bow and arrow permit holders, and during times when only bow and arrows may be used, to hunt deer, antelope and elk in such areas; it is authorized to declare areas open to deer hunting where shotguns only may be used to hunt or kill deer; and it is authorized to declare areas which may be open to special license holders only, and issue special licenses in a limited number when it shall determine, after proper investigation, that such a season is necessary to assure the maintenance of an adequate supply of game birds, fish or animals, or fur-bearing animals, or to declare such a special season and issue special licenses whenever game birds or animals or fur-bearing animals are causing damage to private property, or when written complaint of such damage has been filed with the state fish and game commission by the owner of such property, and in determining to whom such licenses shall be issued, it may, when more

applications are received than the number of animals to be killed, award permits to those chosen under a drawing system.

- (16) It shall have authority to establish and close to hunting, trapping or fishing, game, bird or fish refuges on public lands and, with the consent of the owner, on private lands; and close streams and lakes, or parts thereof, to hunting, trapping or fishing.
- (17) It shall have authority to divide the state into fish and game districts, and to create fish, game, or fur-bearing animal districts throughout the state of Montana and to declare closed season for hunting, fishing, or trapping in any of said districts, so created, and later to open said districts to hunting, fishing, or trapping.
- (18) It shall have authority to declare a closed season on any species of game, fish, or game birds, or fur-bearing animals threatened with undue depletion, from any cause, and to close any area or district of any stream, public lake, or public water, or portions thereof, to hunting, trapping or fishing, for limited periods of time, when such action is necessary to protect recently stocked area, district, water, spawning waters, spawn-taking waters, or spawn-taking stations, or to prevent the undue depletion of fish, game and fur-bearing animals and game and nongame birds, and later to open the same upon consent of a majority of the property owners affected.
- (19) It shall have authority to establish game refuges for the purpose of providing safe sanctuaries in which game and fur-bearing animals or game or nongame birds may breed and replenish. Such refuges shall be established by order of the commission upon the petition and proper showing that such action is, in judgment of the fish and game commission, necessary and in the best interest of the wildlife within the area, to be included within such refuge, it being the purpose of this provision to establish small refuges rather than large preserves or rather than to close large areas to hunting or trapping.
- (20) It shall have authority to designate and protect certain areas as resting, feeding and breeding grounds for migratory birds, in which hunting and molestation shall be forbidden; it being the purpose of this provision not to interfere unduly with the hunting of waterfowl, but to provide havens in which they can rest, feed, and breed without molestation.
- (21) After petition has been duly filed with the secretary of the commission, praying that an area shall be set aside as a game refuge or haven, the said secretary shall immediately publish a notice in a paper of general circulation in the county in which said area is proposed, that a hearing in connection therewith will be held at such place in said county as may be designated on a day not less than fifteen (15) days from the date of the first publication to be specified in said notice, at which time and place all interested parties shall have the right to appear and be heard.
- (22) It shall have authority to establish and maintain an educational and biological department of their work for the collection and diffusion of such statistics and information as shall be germane to the purpose of this act.
- (23) It shall not have authority to issue permits to anyone to carry firearms within the confines of the state of Montana, except to regularly

appointed officers and/or fish and game wardens who are paid by the state of Montana.

- (24) It shall have authority to declare certain fishing waters within the state of Montana closed to fishing by all persons, excepting therefrom that class of persons whose ages are twelve (12) years or less; it being the purpose of this section to provide suitable fishing waters for the exclusive use and enjoyment of juveniles of the age of twelve (12) years or less, at such times and in such areas as the state fish and game commission shall in its discretion deem advisable and consistent with its policies relating to fishing in the state of Montana.
- (25) It shall have authority to promulgate and enforce rules and regulations governing uses of lands acquired, or held under easement, by the commission, or lands which it operates under agreement with or in conjunction with a federal or state agency or private owner. Such rules shall be promulgated in the interest of public health, public safety and protection of property in regulating the use of these lands. Provided further all lease and easement agreements shall itemize uses as listed in subparagraph 13 of this section.
- (26) It shall have authority to promulgate and enforce rules and regulations governing recreational uses of public fishing reservoirs and lakes constructed by the commission or on reservoirs and lakes which it operates under agreement with or in conjunction with a federal or state agency or private owner.

Such rules shall be promulgated in the interest of public health, public safety and protection of property in regulating swimming, hunting, fishing, trapping, boating, including but not limited to boating speed regulations, water skiing, surfboarding, picnicking, camping, sanitation and use of firearms on such reservoirs or at designated areas along the shore of such reservoirs. These rules shall be subject to review and approval by the state board of health as to public health and sanitation before becoming effective. Copies of such rules shall show such endorsement.

History: En. Sec. 4, Ch. 193, L. 1921; re-en. Sec. 3653, R. C. M. 1921; amd. Sec. 2, Ch. 77, L. 1923; amd. Sec. 2, Ch. 192, L. 1925; amd. Sec. 1, Ch. 200, L. 1935; amd. Sec. 1, Ch. 157, L. 1941; Subsec. (24) added by Sec. 1, Ch. 40, L. 1951; Subsec. (15) amd. Sec. 1, Ch. 157, L. 1955; Subsec. (25) added by Sec. 1, Ch. 151, L. 1957; amd. Sec. 1, Ch. 36, L. 1959; Subsec. (26) added by Sec. 1, Ch. 96, L. 1959; amd. Sec. 1, Ch. 173, L. 1965.

Subd. 4

Construction and Application

Where an employee of the state fish and game commission was summarily dismissed by the commission without sufficient notice, he was entitled to relief by way of mandamus, even though, subsequent to the discharge, he was given notice that a hearing on his dismissal would be held. State ex rel. Opheim v. State Fish and Game Commission, 133 M 362, 323 P 2d 1116, 1118.

The power of discharge must be "for cause" and there is no distinction between officers and employees, and removal may be effected only after notice of the charges made has been given and the person involved has been given an opportunity to be heard in his defense. State ex rel. Opheim v. State Fish and Game Commission, 133 M 362, 323 P 2d 1116, 1119, distinguished in 139 M 384, 390, 365 P 2d 942.

Removal Proceedings

Summary dismissal of employee by the state fish and game commission without prior charges by the commission, reasonable notice and hearing thereon, and without affording the employee an opportunity to refute the charges is prohibited. State ex rel. Ford v. State Fish and Game Commission, — M —, 418 P 2d 300, 307.

Under section 26-108 the state fish and

Under section 26-108 the state fish and game director has the power of summary removal without prior charges, notice or

hearing subject to review and final action by the fish and game commission, under this section, if the employee demands it. State ex rel. Ford v. State Fish and Game Commission, — M —, 418 P 2d 300, 305. The state fish and game commission has

The state fish and game commission has no power to discharge an employee summarily without prior notice and an opportunity to be heard. State ex rel. Ford v. State Fish and Game Commission, — M —, 418 P 2d 300, 305.

References

State v. Rathbone, 110 M 225, 238, 100 P 2d 86; Heiser v. Severy, 117 M 105, 117, 158 P 2d 501, 160 ALR 319.

Collateral References

22 Am. Jur., Fish and Fisheries, p. 696, § 40; p. 702, § 47; 24 Am. Jur. 388, Game and Game Laws, § 20 et seq.

Constitutionality and construction of statutes for prevention of waste of food products, 38 ALR 1196.

Constitutionality of statutes licensing or otherwise regulating business of breeding and dealing in game or undomesticated animals, 62 ALR 473.

Availability of writ of prohibition as means of controlling action of fish and game commission. 115 ALR 18 and 159 ALR 627.

DECISIONS UNDER FORMER LAW

Fish and Game Commission without Power To Condemn Site for Fish-rearing Pend

Prior to amendment by Ch. 200, Laws 1935 this section, which granted certain powers to the fish and game commission did not in express terms nor by necessary implication grant to the commission the power to condemn a site for the purpose of constructing a fish-rearing pond. Such being the case, the presumption obtained that the legislature intended that the necessary property should be acquired by contract. State v. Aitchison, 96 M 335, 338, 30 P 2d 805.

Power of Commission To Modify Existing Statutes

A temporary order restraining the state fish and game commission from putting into effect its order lengthening the hunting season on elk in a certain locality, thus modifying such season as fixed by section 26-307, was improper under this section, as amended in 1935, declaring that the statutes governing "such subjects" should continue in force and effect exactly as altered or modified by the rules and regulations of the commission, the legislature so empowered the commission, amounting to modification of existing statutes. State ex rel. Fish and Game Commission of Montana v. District Court, 107 M 289, 292, 84 P 2d 798.

26-104.1. Repealed—Chapter 267, Laws of 1955.

Repeal

This section (Sec. 1, Ch. 126, L. 1953), relating to a special season for hunting

deer with bow and arrow, was repealed by Sec. 5, Ch. 267, Laws 1955.

26-105. (3654) Compensation of commissioners. The members of the commission shall receive no compensation for their services as members thereof, except a per diem of fifteen dollars (\$15.00) for each member for every day in actual attendance at the meetings of said commission, or in the execution of their duties as members of said commission; provided, however, that in no instance shall any member of said commission other than the chairman receive as said per diem a sum in excess of one thousand dollars (\$1,000.00) in any one (1) year, provided that the chairman of the commission shall not receive a sum in excess of one thousand five hundred dollars (\$1,500.00) in any one (1) year, and the members of said commission shall be allowed their actual and necessary traveling expenses, while performing their duties as members of said commission which shall be paid from the fish and game fund of the state of Montana upon presentation of proper vouchers therefor.

History: En. Sec. 5, Ch. 193, L. 1921; re-en. Sec. 3654, R. C. M. 1921; amd. Sec. 1, Ch. 59, L. 1927; amd. Sec. 1, Ch. 152, L. 1949; amd. Sec. 1, Ch. 6, L. 1951; amd. Sec. 1, Ch. 127, L. 1953; amd. Sec. 1, Ch. 57, L. 1957; amd. Sec. 1, Ch. 238, L. 1965.

26-105.1. Budget Act inapplicable. This act shall be deemed and held valid notwithstanding the provisions of the Budget Act.

History: En. Sec. 2, Ch. 152, L. 1949; re-en. Sec. 2, Ch. 6, L. 1951.

Compiler's Note

This act, referred to in this section, is section 26-105.

(3655) State fish and game director—qualifications—powers— The state fish and game commission shall appoint and employ a state fish and game director. He shall be a person having experience, special training and skill in wildlife protection, conservation, and management. He shall be the secretary of the state fish and game commission, attend the meetings of said commission, and keep a record of all of its transactions, and shall make and keep an inventory, showing the description and value of all property owned by the state and under the administration of said commission. He shall be the administrative agent of the state fish and game commission, custodian of the property and records of the fish and game department, and shall maintain his office at the seat of the state government. He shall devote all of his time to his official duties, and such state fish and game director shall have all the powers and duties which are now or may hereafter be by law conferred upon and delegated to the state fish and game director. His powers and duties shall include those of a state game warden hereinafter enumerated. He shall be subject to the supervision and control of said commission and may be removed from office by said commission only for neglect of duty, incompetency or other good cause, and after full hearing on verified charges filed at least twenty (20) days before said hearing and served on said officer at least twenty (20) days before said hearing. The director shall have the authority, by and with the consent of the commission, to establish such department divisions and to employ the necessary personnel that may be needed to conduct the work of the department. The state fish and game director shall be paid a salary fixed by the commission and approved by the state board of examiners, and shall be allowed his actual and necessary traveling expenses while away from the seat of government upon official business connected with his office, but in no one (1) year shall he be allowed as expenses a sum in excess of two thousand dollars (\$2,000.00), the same to be paid upon proper vouchers from the fish and game fund of the state.

History: Earlier acts relative to the fish and game warden were Secs. 1949-1979, inc., Rev. C. 1907; these sections together with several acts amendatory thereof were superseded by chapter 193, L. 1921. This section En. Sec. 6, Ch. 193, L. 1921; re-en. Sec. 3655, R. C. M. 1921; amd. Sec. 3, Ch. 192, L. 1925; amd. Sec. 2, Ch. 59, L. 1927; amd. in part by Sec. 1, Ch. 163, L.

1931, changing the salary of the state fish and game warden; amd. Sec. 1, Ch. 87, L. 1947; amd. Sec. 1, Ch. 81, L. 1951; amd. Sec. 1, Ch. 79, L. 1955.

References

State ex rel. Nagle v. Sullivan, 98 M 425, 40 P 2d 995.

DECISIONS UNDER FORMER LAW

Liability of Warden

The fish and game warden is not liable in damages for failure to sell fishing

licenses to a particular person. Meinecke v. McFarland, 122 M 515, 206 P 2d 1012.

26-106.1. State fish and game warden designated state fish and game director—deputy fish and game wardens designated state fish and game

wardens. From and after passage and approval of this act, the state fish and game warden of the state of Montana shall be designated and known as the "state fish and game director," and all deputy state fish and game wardens of the state of Montana shall be designated and known as "state fish and game wardens."

History: En. Sec. 1, Ch. 37, L. 1955.

Compiler's Note

This act was approved by the governor February 23, 1955.

26-106.2. Application of change of name. Upon the effective date of this act the words or designation "state fish and game warden," wherever the same appears in the Revised Codes of Montana, 1947, as amended, shall be construed to mean and refer to the state fish and game director, and the words or designation "deputy state fish and game wardens" wherever the same appears in the Revised Codes of Montana, 1947, as amended, shall be construed to mean and refer to state fish and game wardens.

History: En. Sec. 2, Ch. 37, L. 1955.

26-107. (3656) State fish and game wardens—appointment—qualifications. The director, by and with the consent and approval of the commission, shall have the power to employ and appoint a deputy director, and a sufficient number of state fish and game wardens for the proper enforcement of the fish and game laws of the state, and the orders, rules and regulations of the commission, and for such other purposes as the director may designate. State fish and game wardens shall be selected from applicants who have passed such an examination as may be required according to the rules adopted and promulgated by the commission. No person shall be appointed a state fish and game warden until a certificate shall have been issued to him by the commission to the effect that he has passed the required examination and is a fit and proper person to perform the duties of the office. State fish and game wardens employed and appointed by virtue of this act shall be persons who have an interest in protection, conservation and propagation of wildlife, game and fur-bearing animals, fish and game birds; they shall devote all of their time to their official duties.

History: En. Sec. 7, Ch. 193, L. 1921; re-en. Sec. 3656, R. C. M. 1921; amd. Sec. 4, Ch. 192, L. 1925; amd. Sec. 3, Ch. 59, L. 1927; amd. Sec. 1, Ch. 158, L. 1941;

amd. Sec. 1, Ch. 121, L. 1947; amd. Sec. 1, Ch. 58, L. 1951; amd. Sec. 1, Ch. 78, L. 1955; amd. Sec. 1, Ch. 77, L. 1957.

26-108. (3657) Employees of the commission—removal—rating—salaries—expenses. The director shall have the power to suspend without pay, reduce in rank, or remove any employee at any time for cause, providing that any person who has been continuously employed for one (1) year or more immediately preceding any suspension or discharge may demand and receive a hearing on charges filed before the fish and game commission. The action of the commission resulting from such a hearing shall be final. The director shall rate all employees on the basis of merit and efficiency in accordance with such rules and regulations as the commission may adopt to secure a proper rating of each person employed. The salaries

of employees shall be fixed by the commission and necessary expenses as provided by law shall be allowed while upon official business away from designated headquarters.

History: En. Sec. 8, Ch. 193, L. 1921; re-en. Sec. 3657, R. C. M. 1921; amd. Sec. 1, Ch. 150, L. 1955.

Removal of Employee

This section does not require that the director hold a hearing before discharging an employee for cause but merely requires that the employee have an opportunity for hearing before the commission. State ex rel. Hollibaugh v. State Fish and Game Commission, 139 M 384, 365 P 2d 942, 947.

The fish and game commission did not act arbitrarily in discharging a state fish and game warden where the evidence showed his incompetency. State ex rel.

Hollibaugh v. State Fish and Game Commission, 139 M 384, 365 P 2d 942, 947.

Misconduct need not be so serious as

to support a criminal conviction in order to furnish cause for removal of an employee. State ex rel. Hollibaugh v. State Fish and Game Commission, 139 M 384, 365 P 2d 942, 948.

Under this section, the state fish and game director has the power of summary removal without prior charges, notice or hearing subject to review and final action by the fish and game commission, under section 26-104, if the employee demands a hearing. State ex rel. Ford v. State Fish and Game Commission, - M -, 418 P 2d 300, 305.

26-109. (3658) **Political activity prohibited.** While retaining the right to vote as he may please, and to express his opinions on all political questions, no employee of the fish and game commission shall take any active part in political management or political campaigns, nor shall he use his official authority or influence for the purpose of interfering with an election, or affecting the results, thereof, or for the purpose of coercing or influencing the political actions of any person or body.

History: En. Sec. 9, Ch. 193, L. 1921; re-en. Sec. 3658, R. C. M. 1921; amd. Sec. 1, Ch. 21, L. 1955.

State ex rel. Nagle v. Sullivan, 98 M 425, 40 P 2d 995.

26-110. (3659) Qualifications, powers and duties of game wardens. (1) The deputy state fish and game wardens [state fish and game wardens] employed and appointed by virtue of this act shall be persons who have had experience, training, and skill in protection, conservation, and propagation of wildlife, game, and fur-bearing animals, fish and game birds, and who shall be interested in said work; they shall devote all of their time for which they are appointed, to their official duties.

(2) It shall be their duty to see that the laws of the state of Montana and the laws, orders, rules and regulations of the state fish and game commission with reference to the protection, preservation and propagation of game and fur-bearing animals, fish and game birds are strictly enforced.

(3) It shall be their duty to see that all those who hunt, fish, or take game, or fur-bearing animals, game birds, or fish, have necessary licenses.

(4) They shall have authority to serve subpoenas issued by any court for the trial of offenses against any of the fish and game laws of the state; they shall have authority to make a search, when they have reasonable cause to believe that any of the game, fish, birds, or quadrupeds, or any parts thereof, have been killed, captured, taken or possessed, in violation of the laws of this state, and without search warrant, to search any tent not used as a residence, boat, car, automobile, or other vehicle, box, locker, basket, creel, crate, game bag, or other package and the contents thereof to ascertain whether any of the provisions of the laws of this state or the rules and regulations of the fish and game commission, for the protec-

tion, conservation or propagation of game and fish or game birds or furbearing animals have been violated, and with a search warrant to search and examine the contents of any dwelling house or other building, to seize and confiscate all game, fish, game birds, and fur-bearing animals or any parts thereof, possessed in violation of the law, or the orders, rules and regulations of the commission, or showing evidence of illegal taking, and seize and confiscate all devices used in the taking of game and fur-bearing animals, fish or game birds illegally, and to hold the same subject to law or the orders of said state fish and game commission; to arrest without warrants any persons committing in their presence any offense against the fish and game laws of the state of Montana, or against any orders, rules and regulations of the commission violation of which has been made a misdemeanor by the provisions of this act, and to arrest without warrant any person who they have reasonable and probable cause to believe has committed any such offense and to take such person immediately before a magistrate having jurisdiction of the same, and to exercise such other powers of peace officers in the enforcement of the fish and game laws of the state, and the orders, rules and regulations of the commission, or of judgments obtained for the violation thereof, not herein specifically provided.

- (5) It shall be their duty at all times to assist in the protection, conservation and propagation of fish, game, and fur-bearing animals, game and nongame birds, and to assist in the planting, distributing, feeding and caring for fish, game and fur-bearing animals, and game and nongame birds; it shall be their duty when ordered by the state fish and game commission, to assist in the destruction of predatory animals, birds, and rodents; it shall be their duty to do and perform all other duties prescribed from time to time by the state fish and game commission, and to make a monthly report to said commission correctly and truthfully informing the said commission of just what each said deputy fish and game warden [state fish and game warden] has done during each day of the preceding month, with regard to the enforcement of the fish and game laws of this state, showing where his duties called him, and what he was called upon to do, and said report shall contain any pertinent recommendations said deputy [warden] may see fit to make.
- (6) No deputy [warden] or special deputy fish and game warden [state fish and game warden] shall have authority to compromise or settle out of court, any violations of the state fish and game laws.

History: En. Sec. 10, Ch. 193, L. 1921; re-en. Sec. 3659, R. C. M. 1921; amd. Sec. 5, Ch. 192, L. 1925.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

Unlawful Possession—Search and Seizure

This section has reference only to what the legislature denounced as unlawful possession under section 26-503, and for which the accused could be prosecuted for unlawful possession. Shipman v. Todd, 131 M 365, 310 P 2d 300, 302.

Where plaintiff lawfully killed a deer but failed to fill out the tag attached to his hunting license and attach it to the carcass, the deer was not unlawfully possessed and the game warden was without authority to seize and confiscate the carcass when he arrested plaintiff for failure to attach the tag. Shipman v. Todd, 131 M 365, 310 P 2d 300, 302.

References

Rosenfeld v. Jakways, 67 M 558, 564, 216 P 776.

26-111. (3660) Oath of state fish and game director and wardens. Before entering upon his official duties, the state fish and game director and state fish and game wardens shall take and subscribe the constitutional oath of office and shall in addition thereto swear, or affirm, that he holds no other position or office, nor any position under any political committee or party. Such oath or affirmation shall be filed in the office of the secretary of state.

History: En. Sec. 11, Ch. 193, L. 1921; re-en. Sec. 3660, R. C. M. 1921; amd. Sec. 14, Ch. 177, L. 1965.

26-112. (3661) Repealed—Chapter 150, Laws of 1955.

Repeal

This section (Sec. 10, Ch. 193, L. 1921; Sec. 6, Ch. 192, L. 1925; Sec. 1, Ch. 216, L. 1943; Sec. 1, Ch. 119, L. 1947; Sec. 1, Ch. 133, L. 1951), relating to deputy fish and game wardens, was repealed by Sec. 2, Ch. 150, Laws 1955.

26-113. (3662) Repealed—Chapters 115 and 150, Laws of 1955.

Reveal

This section (Sec. 13, Ch. 193, L. 1921; Sec. 7, Ch. 192, L. 1925), relating to the appointment of special deputy fish and game wardens, was repealed by Sec. 2, Ch. 115, Laws 1955 and Sec. 2, Ch. 150, Laws 1955. Section 3 of Ch. 115, Laws 1955 revoked all special deputy fish and game warden appointments made prior to Ch. 115, Laws 1955.

26-114. (3663) Appointment of ex officio state fish and game wardens. All sheriffs and their deputies, constables, all peace officers of the state, or any subdivision thereof, and all state forest officers, and such other officers of the United States forest service or agents of the United States fish and wildlife service which are assigned to duty in this state, and field personnel fish and game commission, as the director, with the approval of the state fish and game commission, may appoint are hereby made ex officio state fish and game wardens, without pay, except that the commission may, in its discretion, allow actual and necessary traveling expenses, which, if allowed, shall be paid upon proper vouchers from the state fish and game funds, and shall have the same powers with reference to the enforcement of the fish and game laws of this state as regularly appointed state fish and game wardens, and it is hereby made their duty to assist, whenever possible, in the enforcement of said laws.

History: En. Sec. 14, Ch. 193, L. 1921; re-en. Sec. 3663, R. C. M. 1921; amd. Sec. 1, Ch. 115, L. 1955; amd. Sec. 1, Ch. 236, L. 1965.

Collateral References
Sheriffs and Constables 78.
80 C.J.S. Sheriffs and Constables § 35 et

26-115. (3664) Superintendent of state fisheries—appointment. The state fish and game director shall have general supervision over all hatcheries in the state, and shall with the consent and approval of the commission appoint and employ a superintendent of fisheries, who shall be a competent person and a skilled fish culturist. The output of all state hatcheries shall be used to stock the lakes and streams of the state and shall be for free and impartial distribution within the state, such distribution to be under the direction of said superintendent of fisheries subject to an official order of the state fish and game director. The state fish and game director shall have the power to exchange spawn or fish with other states or persons for distribution in this state.

seq.

History: En. Sec. 15, Ch. 193, L. 1921; re-en. Sec. 3664, R. C. M. 1921; amd. Sec. 8, Ch. 192, L. 1925; amd. Sec. 2, Ch. 81, L. 1951; amd. Sec. 15, Ch. 177, L. 1965. Collateral References Fish \$\infty\$=11. 36A C.J.S. Fish \§ 37.

26-116. (3665) Superintendent of state fisheries—salary. The superintendent of state fisheries, appointed and employed by the state fish and game warden [director] shall receive for his services a salary fixed by the commission with the approval of the state board of examiners and, in addition, shall be allowed his actual and necessary traveling expenses while absent from his place of residence and upon official business connected with his office, but in no instance shall he be allowed for such expenses a sum in excess of one thousand five hundred dollars (\$1,500.00) in any one year, and such salary and expenses shall be paid from the state fish and game fund on proper vouchers.

History: En. Sec. 16, Ch. 193, L. 1921; re-en. Sec. 3665, R. C. M. 1921; amd. Sec. 9, Ch. 192, L. 1925; amd. Sec. 5, Ch. 59, L. 1927; amd. Sec. 1, Ch. 86, L. 1947; amd. Sec. 3, Ch. 81, L. 1951.

Compiler's Note

The bracketed word was inserted by the compiler since by sections 26-106.1

and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

Collateral References Fish € 11. 36A C.J.S. Fish § 37.

26-117. (3666) Powers and duties of superintendent of state fisheries. The superintendent of state fisheries with the approval of the state fish and game warden [director] shall have full control of all state fish hatcheries and shall be responsible for their construction, maintenance, and operation. All such construction work done under contract or otherwise, shall be done under control and supervision of said fish and game warden [director]. The superintendent of state fisheries shall have charge of the work of taking and collecting all spawn, the hatching of all spawn and eggs, rearing, propagating and distribution of fry, fingerlings and fish, and with the consent of the state fish and game warden [director], he shall have power and authority to employ such assistance and help as may be necessary in the operating of fish hatcheries of the state, the gathering of eggs, or the performance of any other work in connection with the protection, propagation and distribution of fish and fry. He shall have authority with the consent of the fish and game warden [director], to purchase so many eyed eggs from time to time, as may be necessary in order to keep the hatcheries of the state supplied with eggs and in full operation; provided, however, that the said superintendent shall make every reasonable effort to collect sufficient eggs from the public streams or lakes of this state, to supply said hatcheries, and for that purpose shall have the right and authority to build, equip, and use fish traps and nets at any and all seasons of the year in all public waters of the state. Said superintendent shall have authority when authorized to by the fish and game warden [director], to purchase the eyed eggs of fish not propagated in this state, for the purpose of stocking the waters of this state.

History: En. Sec. 17, Ch. 193, L. 1921; re-en. Sec. 3666, R. C. M. 1921; amd. Sec. 10, Ch. 192, L. 1925; amd. Sec. 4, Ch. 81, L. 1951.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens. Collateral References Fish \$\infty\$=8. 36A C.J.S. Fish § 26.

(3667) State fish and game commission to control state waters for propagation of fish. From and after the passage of this act, the state fish and game commission is hereby given the right and authority to control the waters of any lake, pond, or stream, which may lie wholly within the limits of the land owned by the state of Montana, so far as the use of said lake, pond or stream for the breeding and propagation of game fish is concerned. Before such right to control any of such lake, pond or stream shall inure to the state fish and game commission, it shall be necessary for the chairman of said commission to notify the state land agent that any such lake, pond or stream is wanted for the purpose herein mentioned, giving a description of the land by legal subdivision when surveyed, or a sufficient general description when not so surveyed, whereupon it shall be the duty of the state land agent to make such entry upon his books and maps as may serve as notice to any lessor or purchaser of the right claimed by the state, in any such lake, pond or stream, and said state land agent shall notify any lessor or purchaser or applicant to lease or purchase of the fact that a right to the use of such lake, pond or stream is so claimed; provided, however, that no such right as is hereby given shall continue for more than one year after such land is sold by the state, and further provided, that should it be found that the right to the control of any such lake, pond or stream heretofore granted lessens the value of said land or prevents the ready sale thereof, that then and in that event the right hereby granted to the state fish and game commission may be terminated upon giving sixty days' notice of such termination to the chairman of the state fish and game commission.

History: En. Sec. 18, Ch. 193, L. 1921; re-en. Sec. 3667, R. C. M. 1921.

Cross-Reference

Protection of fishing streams against construction and hydraulic projects, secs. 26-1501 to 26-1507.

(3668) State fish and game commission shall procure plans for buildings. It shall be the duty of the state fish and game commission of the state of Montana to procure suitable plans and specifications for any buildings erected by their authority or under authority of the state legislature, when the estimated value or cost of the same shall be more than one thousand dollars, and said commission shall cause said buildings to be built, erected and completed in accordance with such plans and specifications, by contract, said contract to be let after publishing said notice stating the time and place of letting the same, and where plans and specifications may be seen. Said notice shall be published not less than once a week for two weeks prior to the time of letting such contract, in some newspaper of general circulation in the county in which said building is to be erected, and elsewhere if deemed best by said commission, and said commission, if not satisfied with the bids received, or for any other reason, may reject any and all bids received and readvertise as often as may be necessary. The contract shall be let to the lowest responsible bidder. Any person to whom a contract may be given shall be required to give a good and sufficient bond, conditioned for the faithful performance and completion of such contract, the same to be approved by the commission, or some member of the commission.

History: En. Sec. 19, Ch. 193, L. 1921; re-en. Sec. 3668, R. C. M. 1921.

Collateral References States©=86. 81 C.J.S. States § 105.

26-120. (3669) Transfer of funds. All funds, appropriations and moneys provided for the purpose of administering or enforcing the present fish and game laws of this state, and all funds, appropriations and moneys belonging to the fish and game fund of this state, and now under the control or in the possession of any officer, person or department of this state, shall be and hereby are placed under the control of the commission hereby created, and shall be collected and disbursed by said commission, pursuant to existing laws and provisions of this act.

History: En. Sec. 20, Ch. 193, L. 1921; re-en. Sec. 3669, R. C. M. 1921.

Collateral References States©=122. 81 C.J.S. States § 154.

References

Heiser v. Severy, 117 M 105, 117, 158 P 2d 501, 160 ALR 319.

- 26-121. (3670) State fish and game moneys. (1) All moneys collected or received from the sale of hunting and fishing licenses or permits, from the sale of seized game or hides, or from fines, damages collected for violations of the fish and game laws of this state, from the appropriations, or received by the commission from any other state source, shall be turned over to the state treasurer, and placed by him in the earmarked revenue fund to the credit of the fish and game commission, provided that out of any fines imposed by a court for the violation of this act, the costs of prosecution shall be paid to the county where the trial was held, in any case where the fine is not imposed in addition to the costs of prosecution. Any moneys received from federal sources shall be deposited in the federal and private revenue fund to the credit of the fish and game commission.
- (2) Said moneys are hereby exclusively set apart and made available for the payment of all salaries, per diem, fees, expenses and expenditures of every source and kind whatsoever, authorized to be made by the state fish and game commission under the terms of this act, and said moneys shall be expended for any and all such purposes, by said commission, subject to appropriation by the legislative assembly of each session; provided, however, that all equipment, printing, materials and supplies of every nature required for the administration and operation of the state fish and game commission must be requisitioned for through the state purchasing agent, and the state purchasing agent shall purchase all necessary equipment, printing, materials and supplies of every nature required for the administration and operation of the state fish and game commission, without charge to the commission for such services.
- (3) The fish and game fund is abolished. Any reference to the fish and game fund in this code shall be taken to mean fish and game moneys in the earmarked revenue fund and federal and private revenue fund.

History: En. Sec. 21, Ch. 193, L. 1921; re-en. Sec. 3670, R. C. M. 1921; amd. Sec. 32, Ch. 59, L. 1927; amd. Sec. 1, Ch. 53, L. 1933; amd. Sec. 2, Ch. 114, L. 1945; amd. Sec. 159, Ch. 147, L. 1963.

References

Heiser v. Severy, 117 M 105, 117, 158 P 2d 501, 160 ALR 319.

Collateral References States@=127. 81 C.J.S. States § 158.

26-122. (3671) Repealed—Chapter 79, Laws of 1955.

Repeal

This section (Sec. 22, Ch. 193, L. 1921; Sec. 1, Ch. 85, L. 1947; Sec. 5, Ch. 81,

L. 1951), relating to employment of personnel, was repealed by Sec. 2, Ch. 79, Laws 1955.

26-123. (3672) Salaries, per diem and expenses, how paid. All salaries, per diem, expenses and claims incurred by the state fish and game commission, or any person appointed or employed by them, shall be paid out of the state fish and game funds, upon warrants properly drawn thereon; provided, however, that the aggregate of all salaries, per diem, expenses and claims presented for payment shall not exceed at any time the total amount in said state fish and game fund. The state fish and game commission shall approve all bills properly presented which have been incurred under its authority and by its direct order. The expenses of all deputy state fish and game wardens (state fish and game wardens) shall be approved by the state fish and game warden (director), before they are paid, and the salary, per diem or expenses of any employee employed in the propagation or distribution of fish shall be approved by the superintendent of state fisheries, before they are paid. All items of expense, amounting to more than one and one-half dollars incurred by anyone employed in the state fish and game department, shall be evidenced by a proper voucher or receipt, before they shall be approved, allowed, or paid.

History: En. Sec. 23, Ch. 193, L. 1921; re-en. Sec. 3672, R. C. M. 1921; amd. Sec. 17, Ch. 97, L. 1961.

Damages for Torts Not Payable as Expenses

The state fish and game fund, composed of moneys from sale of hunting and fishing licenses, from sale of seized game or hides, and fines and damages collected for violations of fish and game laws and from appropriation by the legislature, is property of the state and moneys therein may not lawfully be used to pay for torts committed by officers or employees of the state fish and game commission for which such officers or employees are personally liable as individual wrongdoers. Heiser v. Severy, 117 M 105, 117, 158 P 2d 501, 160 ALR 319.

26-124. (3673) Reports of state fish and game director. The state fish and game warden [director] shall, on or before the first day of June of each year, make a written report to the state fish and game commission of the operation of his department during the preceding year ending April 30th and the state fish and game commission shall thereafter, and on or before the first day of November of each even-numbered year transmit such reports together with a detailed report to the governor, of its work and of moneys collected or received, with the sources thereof, and all disbursements and expenditures, with the details connected therewith, the result of investigations made by it during the preceding two (2) year period with recommendations as to measures to be taken or enacted to conserve and propagate the fish, game, game birds and game, and fur-bearing ani-

mals of the state, and if such recommendation embody legislation, drafts of bills to accomplish the purposes desired.

History: En. Sec. 24, Ch. 193, L. 1921; re-en. Sec. 3673, R. C. M. 1921; amd. Sec. 6, Ch. 81, L. 1951.

Compiler's Note

The bracketed word was inserted by the

compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

26-125. (3674) Publication of laws. As soon as practicable after the adjournment of each session of the legislature, the state fish and game warden [director] in co-operation with the attorney general, shall make a compilation of the laws relating to fish, game, game birds and animals, as amended and in force at the date of such compilation, and properly index the same. Copies of said compilation sufficient in number for the purposes of this section, shall be printed in pamphlet form, pocket size. It shall be the duty of the state fish and game warden [director] to distribute to justices of the peace, deputy fish and game wardens [fish and game wardens], and other officers and persons empowered to issue licenses for hunting, fishing and trapping, a supply of such compilation sufficient to permit one copy thereof to be given anyone desiring the same. The expense incurred by printing said laws shall be paid out of the state fish and game fund.

History: En. Sec. 25, Ch. 193, L. 1921; re-en. Sec. 3674, R. C. M. 1921.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

26-126. (3675) Duty of attorney general to advise commissioners—prosecuting attorneys to prosecute complaints. The attorney general of the state is the legal adviser of the commission, and shall, together with the several county attorneys, enforce the provisions of this act.

History: En. Sec. 26, Ch. 193, L. 1921; re-en. Sec. 3675, R. C. M. 1921.

Collateral References
Attorney General 5-6.
7 C.J.S. Attorney General \$ 5.

26-127. (3676) Creating fish and game preserves, refuges, sanctuaries, rest grounds, closed districts and closed seasons. Preserves, refuges, sanctuaries, rest grounds, or closed districts made or created by said commission, and any land or water areas or portions thereof, closed by said commission, shall be conspicuously posted for a period of twenty (20) days, with posters setting forth their purposes and the penalties for violating the orders, rules and regulations of the state fish and game commission applicable to them. Not less than twenty (20) days before any fish and game district, closed district, preserve, refuge, sanctuary, rest ground, so created by said commission, or closure of land or water areas becomes effective, publication shall be made as provided in section 26-128 of the boundaries of such fish and game district, closed district, preserve, refuge, sanctuary or rest ground, so created by said commission, such boundaries to be accurately designated by definite topographic monuments or public land survey. The hunting, pursuing, capturing, killing or taking of any fish

or game animals or game birds or fur-bearing animals in violation of the rules, regulations or orders of the state fish and game commission governing any closed season, fish and game district, refuge, sanctuary, preserve, rest ground or closed land or water area, promulgated by said commission shall be punishable with the same penalties as provided for the violation of the state fish and game laws of this state, regarding closed seasons. All game preserves or refuges heretofore created are continued in full force and effect until such time as the same are changed by the commission in the manner herein designated; provided, that said commission shall have the right, power and authority when properly petitioned to alter, and change the boundaries of, or entirely do away with and abandon any preserve or refuge, excepting the Sun River game preserve, when in the opinion of said commission, it is to the best interest so to do.

History: En. Sec. 27, Ch. 193, L. 1921; re-en. Sec. 3676, R. C. M. 1921; amd. Sec. 1, Ch. 87, L. 1933; amd. Sec. 1, Ch. 145, L. 1937.

Collateral References
Fish 12; Game 31/2.
36A C.J.S. Fish § 26; 38 C.J.S. Game
§ 7.
24 Am. Jur. 377, Game and Game Laws,
§ 5.

- 26-128. (3677) Posting and publication of orders, rules and regulations of commission. The orders, rules and regulations of the state fish and game commission shall be published and posted in the following manner:
- (1) Those having general application throughout the state shall be published in such manner and to such an extent as the state fish and game commission deems necessary and may direct.
- (2) Those of general or special character having local application only shall be published once in some newspaper having general circulation in the locality or district wherein such rules, regulations, or orders are applicable, and shall be posted in three conspicuous places in the locality or district in which they are applicable.

History: En. Sec. 28, Ch. 193, L. 1921; re-en. Sec. 3677, R. C. M. 1921; amd. Sec. 11, Ch. 192, L. 1925.

26-129. (3678) Effect of orders, rules and regulations. All orders, rules and regulations for the enforcement of the powers granted to the state fish and game commission shall take effect and be in force, after publication and posting as in this chapter prescribed, and when so published or posted shall constitute legal notice.

History: En. Sec. 29, Ch. 193, L. 1921; re-en. Sec. 3678, R. C. M. 1921.

26-130. (3679) Repealed—Chapter **159**, Laws of **1955**.

Renest

This section (Sec. 30, Ch. 193, L. 1921; Sec. 2, Ch. 87, L. 1933; Sec. 2, Ch. 224, L. 1947), relating to the penalty for violation of fish and game laws, or orders,

rules and regulations of the commission, was repealed by Sec. 2, Ch. 159, Laws 1955. For new penalty provision, see section 26-324.

26-131. Preamble concerning Indian treaty of 1855. Whereas, by treaty of July 16, 1855, between the United States of America, represented

by Isaac I. Stephens, governor and superintendent of Indian affairs for the Territory of Washington, and the chiefs, headmen and delegates of the confederated tribes of the Flathead, Kootenai and Upper Pend d'Oreille Indians, the said Indians were given the exclusive right to fish and hunt on the Flathead Indian reservation, and the privilege of hunting in their usual hunting grounds on large areas of Montana, and

Whereas, nonmembers of such tribes have the right to hunt and fish on Indian lands by sufferance of such tribes only, and

Whereas, it appears to be to the common advantage of the state and such Indian tribes that hunting and fishing regulations and privileges on other lands of the state and on Indian lands shall be uniform, and that hunting and fishing on such Indian lands shall be in common with the public, now, therefore

History: En. Preamble, Ch. 198, L. 1947.

Treaty of 1855

Indians were not subject to state fish and game laws on reservation property since under the treaty of 1855 between since under the treaty of 1855 between the Indians of Flathead reservation and the United States the exclusive right to hunt and fish within the boundaries of the reservation were reserved by the In-dians. State v. McClure, 127 M 534, 268 P 2d 629, (Dissenting opinion, 127 M 534, 268 P 2d 629, 636.)

The exclusive right to hunt and fish, under the treaty, on all of the lands within the exterior boundaries of the Flathead Indian reservation was not granted by the United States but was reserved by the

Indians. State v. McClure, 127 M 534, 268 P 2d 629, 635. (Dissenting opinion, 127 M 534, 268 P 2d 629, 636.) The right of hunting and fishing within

the boundaries of the reservation was intended to be a continuing one against the United States and its grantees as well as against the state and its grantees. These rights were never alienated and as far as state laws are concerned the Indian tribes bound by the treaty are entitled to hunt and fish therein at any time. The only restriction thereon is the ordinances and laws of their own council and the laws of Mr. Strain Strai

26-132. Authority for commission to make agreement with Indians concerning hunting and fishing. That the state fish and game commission be, and the same is hereby authorized, empowered and enabled to negotiate and conclude an agreement with the council of the Confederated Salish and Kootenai tribes of the Flathead Indian reservation for the purpose of obtaining and establishing for the citizens of Montana, regularly licensed to hunt and fish in the state, the privileges of hunting and fishing on Indian lands on the Flathead Indian reservation, and for the purpose of the conservation and protection of fish, game and fur-bearing animals on such Indian lands, and on lands adjacent thereto; and for the further purposes of; setting dates for the opening and closing of seasons for hunting and fishing on such lands for Indians and whites alike, opening and closing of streams and land areas for hunting and fishing, and of doing what in its judgment is necessary by way of granting to such tribal Indians state permits to hunt and fish, to be issued without charge to such Indians, of stocking streams and land areas of such Indian lands for the common benefit, of policing such Indian lands for the protection of fish and game, and in general to carry out the purposes of this act. Provided, however, that if any part of such treaty shall provide for the payment of money in the premises to such tribes, such part shall first have the approval of the state legislature.

History: En. Sec. 1, Ch. 198, L. 1947.

26-133. Payments to counties for department owned land—exceptions. The state fish and game warden [director] shall, on or before the 15th day of October, of each year, prepare and transmit a voucher to the treasurer of each county wherein the state of Montana fish and game department owns any lands acquired by it for its purposes as provided by law, which voucher shall describe the lands situate within the county and state the number of acres in each parcel thereof and shall authorize the drawing of a warrant to the county in a sum equal to the amount of taxes which would be payable on county assessment of said property were it owned by and taxable to a private citizen for the total acreage shown on the voucher. Each county treasurer receiving such a voucher shall execute the same and return it to the state fish and game warden [director], who shall approve it and transmit it to the state auditor. The state auditor shall draw a warrant in the amount shown on each voucher, payable to each county, and shall transmit said warrant to the county treasurer thereof. Such warrant shall be payable out of any funds to the credit of the state fish and game commission: Provided, that no voucher shall include and no payment shall be made to any county wherein the state of Montana fish and game department owns less than one hundred (100) acres, and no voucher shall include and no payment shall be made to any county for any lands owned by the state of Montana fish and game department for game bird farm or fish hatchery purposes.

History: En. Sec. 1, Ch. 1, L. 1951; amd. Sec. 1, Ch. 188, L. 1953.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

26-134. Allocation of funds to school districts. The county commissioners of any county receiving such funds shall be, and they are, hereby authorized to allocate any portion of such funds to any school district in said county, which school district shall contain any of said lands, in such amounts as they shall determine; and any balance remaining, after allocations have been made to school districts, shall be credited to the general fund of said county.

History: En. Sec. 2, Ch. 1, L. 1951.

26-135. Wild animals damaging property—investigation—special season—destruction by commission—allowing holders of property to kill. Upon the request or complaint of any landholder, or person in possession and having charge of any land in the state, that wild animals of the state, protected by the fish and game laws and regulations, are doing damage to the said property or crops thereon, the state fish and game department shall investigate and study the situation with respect to damage and depredation. The department may then decide to open a special season on the said game, or if the special season method be not feasible, then the department may destroy the animals causing the damage. Provided, further, that the fish and game department may authorize and grant the holders of said property permission to kill or destroy a specified number of the animals causing the damage. Provided, further, no wild ferocious

animal damaging property or endangering life shall be covered by this

History: En. Sec. 1, Ch. 60, L. 1957.

26-136. Meat of wild animals so killed—disposition. Provided, further, that the meat of all animals so killed or destroyed by the fish and game department or the authorized landholder shall be conserved and given to state institutions or to the school lunch programs, or welfare department. It shall be the duty of the fish and game department to provide transportation and distribution of the meat killed under the authorization of this act.

History: En. Sec. 2, Ch. 60, L. 1957.

CHAPTER 2

FISHING AND HUNTING LICENSES

Section 26-201. Definitions.

26-202. License required.

26-202.1. Licenses—fees—classifications of licenses—fees and powers under licenses.

26-202.2. Special licenses—tagging of carcasses of game animals.

26-202.3. Defining resident.

26-202.4. Power of fish and game commission to make rules and regulations.

26-202.5. Provision for nonresident bear license.

26-203. Repealed.

26-204. Application for license. 26-205 to 26-208. Repealed.

26-209. Act construed as providing additional nonresident license. 26-210. Bounty claims for wild animals—approval and payment. 26-211. Repealed. 26-212. Form and contents of licenses.

Form and contents of licenses.

26-212.1. Information to be included in big game licenses.

26-213. Carrying and exhibiting license.
26-214. Termination of license.
26-215. Exemption from general provisions.
26-216. Repealed.
26-217. Alteration or transfer of license.

26-217. Repealed.
26-218. Repealed.
26-219. Repealed.
26-220. License agents—appointment.
26-221. Bond of license agent—preferred claim of state for license money.
26-222. Compensation—duties.

26-223. Appointments nontransferable—revocation—oaths.

26-224. Prior appointments affected.

26-225. Reciprocal fishing privileges of licensees of bordering states-agreements authorized.

26-226. Devices and equipment used under reciprocal privilege.

Bodies of water covered by reciprocal privileges.

Rules and regulations to implement reciprocal agreements-violations.

26-201. (3681) Definitions. For the purpose of this act, the following shall be construed, respectively to mean:

Commission. The state fish and game commission.

Person. The plural or singular, male or female, as the case demands, including individual, associations, partnerships, and corporations, unless the context otherwise requires.

Open season. The time during which game birds, fish, game and furbearing animals may be lawfully taken.

Closed season. The time during which game birds, fish, game and fur-bearing animals may not be lawfully taken.

Angling or fishing. The taking of, or attempting to take fish by hook and single line or single rod in hand or within immediate control.

Upland game birds. Sharptail grouse, blue grouse, prairie chicken, sage hen or sage grouse, fool hen, ruffed grouse, commonly called native pheasant or native partridge, quail, Chinese pheasant and Mongolian pheasant, commonly called ring-necked pheasant, Hungarian partridge, ptarmigan, wild turkey, and chukar partridge.

Migratory game birds. Waterfowl, including wild ducks, wild geese, brant, and swans; cranes, including little brown, sandhill and whooping cranes; rails, including coots, gallinules, sora or other rails; shore birds, including avocets, curlew, dowitcher, godwits, knots, upland plover, kill-deer, sandpipers, Wilson snipes, or jacksnipes, snipes, stilts, plovers, willets and yellow legs.

Nongame birds. All wild birds not defined herein as upland game birds or migratory game birds, shall be deemed nongame birds.

Game animals. Deer, elk, moose, antelope, caribou, mountain sheep, mountain goat, bear and bison or buffalo.

Fur-bearing animals. Marten or sable, otter, muskrat, fisher, mink, beaver and black-footed ferret.

Predatory animals. Coyote, wolf, wolverine, mountain lion, weasel, skunk and civetcat, and bobcat.

Game fish. All species of the family salmonidae (chars, trout, salmon, grayling, and whitefish); all species of the genus strizostedion [stizostedion] (sandpike or sauger and walleyed pike or yellow pike perch); all species of the genus esox (northern pike, pickerel and muskellunge); all species of the genus micropeterus (bass); and all species of the genus polyodon (paddlefish).

History: En. Sec. 1, Ch. 238, L. 1921; re-en. Sec. 3681, R. C. M. 1921; amd. Sec. 3, Ch. 77, L. 1923; amd. Sec. 12, Ch. 192, L. 1925; amd. Sec. 6, Ch. 59, L. 1927; amd. Sec. 1, Ch. 37, L. 1949; amd. Sec. 1, Ch. 36, L. 1951; amd. Sec. 1, Ch. 121, L. 1951; amd. Sec. 1, Ch. 19, L. 1953; amd. Sec. 1, Ch. 34, L. 1959; amd. Sec. 1, Ch. 11, L. 1965; amd. Sec. 1, Ch. 28, L. 1965.

Compiler's Note

This section was amended twice in 1965, once by Ch. 11 and once by Ch. 28. Except for a correction in the definition of "Commission" made by both, neither

amendatory act mentioned nor included the changes made by the other. Since the two amendments do not appear to be in conflict, the compiler has made a composite section incorporating the changes made by both amendatory acts.

References

State ex rel. Fish and Game Commission of Montana v. District Court, 107 M 289, 290, 84 P 2d 798.

Collateral References

Fish = 2; Game = 2. 36A C.J.S. Fish § 1; 38 C.J.S. Game § 1.

26-202. (3682) **License required.** It shall be unlawful and a misdemeanor punishable as provided by section 26-324 for any person to pursue, hunt, trap, take, shoot, kill or attempt to trap, take, shoot, or kill, any game animal, or any game bird, or any fur-bearing animal, or to take, kill, trap, or fish, for any fish within this state, or to have, keep or possess within this state, any game animal, game bird, fur-bearing animal, or game fish, or parts thereof, except as herein provided or shall be provided by the state fish and game commission, or for any person to pursue, hunt,

trap, take, shoot or kill, or attempt to trap, take, shoot or kill, any game animal, game bird, or fur-bearing animal, or take, kill, trap, or fish for, any fish except at the places and during the periods and in the manner herein defined or shall be defined by the state fish and game commission, or for any person to pursue, hunt, trap, take, shoot or kill, or attempt to trap, take, shoot or kill, any game animal, game bird, or fur-bearing animal, or take, kill, trap, or fish for, any fish within this state, or have, keep, possess, sell, purchase, ship or reship, any imported or other fur-bearing animal, or parts thereof, without first having obtained a proper license or permit from the commission so to do.

History: En. Sec. 2, Ch. 238, L. 1921; re-en. Sec. 3682, R. C. M. 1921; amd. Sec. 13, Ch. 192, L. 1925; amd. Sec. 7, Ch. 59, L. 1927; amd. Sec. 3, Ch. 224, L. 1947.

Collateral References Fish@10 (1); Game@5. 36A C.J.S. Fish § 36; 38 C.J.S. Game § 15. 24 Am. Jur. 389, Game and Game Laws, § 22.

Applicability of state fishing license laws or other public regulations to fishing in private lake or pond. 15 ALR 2d 754.

- 26-202.1. Licenses—fees—classifications of licenses—fees and powers under licenses. (1) Class A license—Resident Fishing License. Any resident as defined by section 26-202.3, upon payment of a fee of four dollars (\$4) shall receive a Class A license which shall entitle the holder thereof to fish with hook and line or rod as authorized by regulations of the commission.
- (2) Class A-1 license—Resident Game Bird License. Except as herein provided, any resident as defined by section 26-202.3, who is twelve (12) years of age or older, may, upon payment of a fee of two dollars (\$2) receive a Class A-1 license, which will entitle the holder to pursue, hunt, shoot and kill game birds and possess the dead bodies of game birds which are so authorized by regulations of the commission.

(a) No hunting licenses shall be issued to any resident person under the age of eighteen (18) years unless he presents to the person authorized to issue such license a certificate of competency as provided by this section.

The department of fish and game shall provide for a course of instruction in the safe handling of firearms and for the purpose may cooperate with any reputable association or organization having as one of its objectives the promotion of safety in the handling of firearms. The department may designate any person found by it to be competent to give instructions in the handling of firearms. A person so appointed shall give such course of instruction and upon the successful completion thereof shall issue to the person instructed a certificate of competency in the safe handling of firearms.

(3) Class A-2 License—Special Bow and Arrow License. Any holder of the following: a Class A-3, A-4, A-5, B-2, B-5 or B-6 license, may upon payment of an additional sum of three dollars (\$3) to any agent of the fish and game commission authorized to issue fishing and hunting licenses be entitled to a Class A-2 license, which shall authorize the holder thereof to pursue, hunt, shoot, and kill deer, antelope and elk with bow and arrow and to possess the carcass of deer, antelope and elk during a special season, as so licensed and in special areas, as may be designated by the fish and game commission.

- (4) Class A-3, A-4, A-5 Licenses. Any resident as defined by section 26-202.3 who is twelve (12) years of age or older, may upon payment of the proper fee or fees be entitled to purchase one each of the following licenses: Class A-3, Deer A Tag, three dollars (\$3); Class A-4, Deer B Tag, five dollars (\$5); Class A-5 Elk Tag, three dollars (\$3); which will entitle the holder to pursue, hunt, shoot, and kill the game animal or animals authorized by the license held and to possess the dead bodies of game animals of the state which are so authorized by the regulation of the commission. Any holder of a Class A-3, A-4, or A-5 license shall further be entitled to pursue, hunt, shoot and kill black or brown bear and possess the dead bodies of black or brown bear which are so authorized by regulations of the commission.
- (5) Class B license—Nonresident Fishing License. Any person not a resident as defined in section 26-202.3, upon payment of the sum of fifteen dollars (\$15) to any agent of the fish and game commission authorized to issue fishing and hunting licenses, shall be entitled to a Class B license, which shall entitle the holder thereof to fish with hook and line as authorized by the rules and regulations of the commission.
- (6) Class B-1 License—Nonresident Game Bird License. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older, upon payment of the sum of twenty-five dollars (\$25) to any agent of the fish and game commission authorized to issue fishing and hunting licenses shall be entitled to a Class B-1 license, which shall entitle the holder thereof to pursue, hunt, shoot, kill and possess game birds as authorized by the rules and regulations of the commission.
- (7) Class B-2 License—Nonresident Big Game License. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older, upon the payment of the sum of one hundred twenty-five dollars (\$125) for the license year from May 1, 1967 to April 30, 1968 and thereafter for subsequent license years upon payment of the sum of one hundred fifty dollars (\$150) to any agent of the fish and game commission authorized to issue fishing and hunting licenses, shall be entitled to a Class B-2 license which shall authorize the holder to pursue, hunt, shoot, and kill game animals in the area or areas designated in the license, as determined by the commission, and to possess the carcasses of same, and to pursue, hunt, shoot, kill and possess game birds, and to fish with hook and line as may hereinafter be authorized by the rules and regulations of the commission.
- (8) Class B-3 license—Temporary Nonresident or Tourist Fishing License. Any person not a resident as defined in section 26-202.3, upon payment of the sum of five dollars (\$5) to any agent of the fish and game commission authorized to issue fishing and hunting licenses, shall be entitled to a temporary nonresident fishing license, which shall authorize the holder to fish with hook and line as authorized by the rules and regulations of the fish and game commission for a period of six (6) days inclusive of the dates indicated on the license.
- (9) Class B-5 License—Nonresident Deer License. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older, upon the payment of the sum of thirty-five dollars (\$35) shall be entitled to a Class B-5 license which shall authorize the holder to pursue,

hunt, shoot, and kill one (1) deer in the area or areas designated in the license, as determined by the commission, and to possess the carcass of same.

- (10) Class B-6 License—Nonresident Antelope License. Any person not a resident as defined in section 26-202.3, but who is twelve (12) years of age or older, upon the payment of the sum of thirty-five dollars (\$35) shall be entitled to a Class B-6 license which shall authorize the holder to pursue, hunt, shoot, and kill one (1) antelope in the area designated in the license, as determined by the commission, and to possess the carcass of same.
- (11) Special licenses. Any applicant who is a resident as defined by section 26-202.3, or any applicant who is the holder of a Class B-2 nonresident big game license may apply for a special license, which in the judgment of the fish and game commission, is to be issued and shall pay the following fees therefor:

Moose, resident twenty-five dollars (\$25), nonresident fifty dollars \$50).

Mountain Goat, resident fifteen dollars (\$15), nonresident thirty dollars (\$30):

Mountain Sheep, resident twenty-five dollars (\$25), nonresident fifty dollars (\$50):

Bison or Buffalo, resident twenty-five dollars (\$25), nonresident one hundred dollars (\$100):

Antelope, resident three dollars (\$3), nonresident ten dollars (\$10);

Grizzly Bear, resident one dollar (\$1), nonresident twenty-five dollars (\$25).

In the event a holder of a valid special grizzly bear license kills a grizzly bear, he must purchase a trophy license for a fee of twenty-five dollars (\$25) within ten (10) days after date of kill. Such trophy license shall authorize the holder to possess and transport said trophy.

In the event that the number of valid applications for special licenses exceeds the number of special licenses which the fish and game commission desires to issue in any hunting district, then the number of special licenses issued to the holders of Class B-2 nonresident big game licenses shall not exceed ten per cent (10%) of the total issued. Any holder of a special license as herein provided shall be further entitled to pursue, hunt, shoot and kill black or brown bear and possess the dead bodies of black or brown bear which are so authorized by regulations of the commission.

- (12) Class C License—Trapper's License. Any resident as defined in section 26-202.3, upon making application and paying the sum of ten dollars (\$10) to the fish and game commission, shall be entitled to a trapper's license, which shall authorize the holder thereof to trap fur-bearing animals, within the state of Montana at such times and in such manner as may be lawful so to do under the laws of the state and the regulations of the fish and game commission, and at such places as may be designated in said license.
- (13) Class C-1 License—Landowner's Trapping License. Any owner or tenant, or member of the immediate family of said owner or tenant, upon making application to the fish and game commission, and upon payment of the sum of one dollar (\$1) shall be entitled to a landowner's trapping license which shall entitle the holder thereof to trap any fur-bearing animal,

except beaver, on land owned or leased by him, or his immediate family, at such times and in such manner as may be lawful so to do under the laws of the state and the regulations of the fish and game commission and at such places as may be designated in said licenses.

(14) Exception. (a) A resident under the definition of section 26-202.3, who is sixty-five (65) years or older shall be entitled to fish without a Class A license and hunt game birds without a Class A-1 license. He shall carry proof of age in lieu of the license.

(b) A child residing at the Montana children's center at Twin Bridges and the committed residents of the Montana training center at Boulder will be entitled to fish without a license. He shall carry a written statement by the superintendent of the center in lieu of the license.

(c) If a person is convicted of a violation of the fish and game laws or regulations of Montana, the privilege conferred by this subsection shall

be revoked for not less than six (6) months.

(d) Residents, as defined by section 26-202.3, under the age of fifteen (15) years may purchase Class A-1, A-3, A-4, and A-5 licenses for one-half $(\frac{1}{2})$ of the fees prescribed in this section.

(e) The commission, by rule or regulation, may prescribe the number of Class B-5 and B-6 licenses to be issued in each of the hunting districts

designated by it.

- (f) Special antelope licenses. In the event the number of valid applications for special antelope licenses for a hunting district exceeds the quota set by the commission for the district, such licenses shall be awarded by a drawing. Persons making valid application who did not receive an antelope license during the season immediately preceding the drawing shall be given first preference in such drawing for first, second and third choice hunting districts. The commission shall have the authority to promulgate such rules and regulations as are necessary to implement this subsection.
- (15) Only one (1) license of any one (1) class, except Class B-3 and B-4 licenses, shall be issued to any one (1) person, provided, however, that the commission may prescribe rules and regulations for the issuance or sale of a replacement license of the same class in the event the original license is lost, stolen or destroyed upon payment of the sum of one dollar (\$1).
- (16) Class AAA License-Sportsman's License. Any resident, as defined by section 26-202.3, who is twelve (12) years of age or older, upon payment of the sum of twenty dollars (\$20) shall be entitled to a sportsman's license which shall permit the holder to exercise all rights granted to holders of Class A, A-1, A-3 and A-5 licenses. The commission shall furnish each holder of a sportsman's license an appropriate decal.

History: En. Sec. 1, Ch. 267, L. 1955; amd. Sec. 1, Ch. 16, L. 1957; amd. Sec. 1, Ch. 100, L. 1957; amd. Sec. 2, Ch. 36, L. 1959; amd. Sec. 1, Ch. 36, L. 1963; amd. Sec. 1, Ch. 55, L. 1963; amd. Sec. 1, Ch. 148, L. 1963; amd. Sec. 1, Ch. 9, L. 1965; amd. Sec. 1, Ch. 241, L. 1965; amd. Sec. 1, Ch. 319, L. 1967.

26-202.2. Special licenses—tagging of carcasses of game animals. Special licenses authorized to be issued under the general powers of the fish and game commission may be issued only to persons holding valid big game licenses for the current year, which have been obtained by the application [applicant] prior to the time of filing of application for a special license.

- (2) Any person who has obtained a moose, mountain sheep, bison, or buffalo license shall not be eligible to apply for another such license for the next succeeding seven (7) years, if such person has killed or taken an animal of the species for which such special license was issued. Any person who has obtained a moose, mountain sheep, bison or buffalo license but did not kill or take an animal of the species for which such special license was issued, shall be eligible to apply for another such license in any succeeding year if he returns his unused special license to the fish and game commission before or at the time application is made. It is further provided that any person who has received a special license for elk or mountain goat shall not be eligible to receive a second special license for this species of game animal during any license year. However, in the event the number of applications received is not equal to the number of game species desired to be killed by the commission reapplication may be made by those valid license holders of the current year who may fall within these limitations. It is further provided that any person who has killed or taken a game animal, except a deer or antelope, during the current license year, shall not be permitted to receive a special license under this act to hunt or kill a second game animal of the same species.
- Tagging of Carcasses of Game Animals. Every license issued by the fish and game commission authorizing the holder thereof to pursue. shoot, kill, capture, take or possess game animals, whether issued to a resident or a nonresident, shall have attached thereto, certain tags, coupons, or markers, the form of which shall be prescribed by the state fish and game commission, and when any person should take or kill any deer. elk, moose or antelope under such license, such person shall immediately thereafter attach to said animal or animals the proper tag, coupon or other marker, completely filled out with the name of the license holder, address, date the animal was killed, place the animal was killed, and any other information requested on such tag, coupon or other marker, and such tag, coupon or other marker shall be kept attached to said carcass so long as any considerable portion of the carcass remains unconsumed. Such tag, coupon or other marker shall be valid only when attached to said license or when such tag, coupon or other marker has been completely filled out and attached to a legally taken game animal, and when the proper tag, coupon or other marker is attached to said game animal so killed, the same may be possessed, used, stored and transported, provided the necessary permit to transport the same accompanies the shipment. Any person who should kill any deer, elk, moose or antelope by authority of any license issued for the killing of such game animal, and shall fail or neglect to fill out and attach his tag, coupon or other marker so provided with the license issued, to the carcass of said deer, elk, moose or antelope or portion thereof. or any person who shall fail to keep said tag, coupon or other marker attached to said deer, elk, moose or antelope or portion thereof while the same is possessed by him shall be guilty of a misdemeanor and upon conviction thereof shall be punished as provided for by law in section 26-324.

History: En. Sec. 2, Ch. 267, L. 1955; amd. Sec. 1, Ch. 65, L. 1963.

DECISIONS UNDER FORMER LAW

Seizure and Confiscation of Untagged Carcass

In a case which arose while section 26-205 (subsequently repealed) was in effect it was held that where plaintiff lawfully killed a deer but failed to fill out the tag attached to his hunting license and attach it to the carcass, the deer was not unlawfully possessed and the game warden was without authority to seize and confiscate the carcass when he arrested plain-

tiff for failure to attach the tag. Shipman v. Todd, 131 M 365, 310 P 2d 300.

Where plaintiff lawfully killed a deer

Where plaintiff lawfully killed a deer but failed to fill out the tag attached to his hunting license and attach it to the carcass as required by section 26-205 (since repealed), the deer was not unlawfully possessed and the game warden was without authority to seize and confiscate the carcass when he arrested plaintiff for failure to attach the tag. Shipman v. Todd, 131 M 365, 310 P 2d 300.

- 26-202.3. Defining resident. That in determining a resident for the purpose of issuing resident fishing and hunting licenses, the following provisions shall apply:
- (1) That members of the armed forces of the United States or members of the armed forces of forcign governments attached to the armed forces of the United States, who are assigned to duty in Montana, and members of their immediate families, and after a period of thirty (30) days within Montana, upon presenting assignment orders emanating from the proper unit commander, shall be considered residents for the purpose of this act. The thirty (30) day residence requirement is waived in time of war.
- (2) Any citizen of the United States of America who has been a resident of the state of Montana, as defined in section 83-303, for a period of six (6) months immediately prior to making application for said license shall be eligible to receive a resident hunting or fishing license.
- (3) Any enrollee of a job corps camp located within the state of Montana shall, after a period of thirty (30) days within Montana, be considered a resident for the purpose of making application for a fishing license as long as he remains an enrollee in a Montana camp.

History: En. Sec. 3, Ch. 267, L. 1955; amd. Sec. 1, Ch. 106, L. 1959; amd. Sec. 1, Ch. 72, L. 1961; amd. Sec. 1, Ch. 28, L. 1963; amd. Sec. 1, Ch. 33, L. 1967; amd. Sec. 1, Ch. 37, L. 1967.

Compiler's Note

This section was amended twice in 1967. The two amendments do not appear to conflict, so the compiler has made a composite section embodying the changes made by both 1967 amendatory acts.

26-202.4. Power of fish and game commission to make rules and regulations. The fish and game commission is hereby authorized to make, promulgate and enforce such reasonable rules and regulations not inconsistent with the provisions of this act as in its judgment will accomplish the purpose of this act.

History: En. Sec. 4, Ch. 267, L. 1955.

26-202.5. Provision for nonresident bear license. The state fish and game commission may issue special licenses in the manner provided in subsection 15 of section 26-104 to nonresidents to hunt black or brown bear, including any color phase of black bear. Such special nonresident license shall be valid only for the area designated on the license and shall expire on the thirty-first (31st) day of August of each year. The fee for

such special nonresident license shall be thirty-five dollars (\$35). There shall be a permit included with such special nonresident license, to authorize the holder thereof to ship, transport or remove out of state any bear or part thereof taken under authority of said license.

The fish and game commission is authorized to promulgate rules and regulations relative to tagging, possession or transportation of bear within or without the state.

History: En. Sec. 1, Ch. 239, L. 1965; amd. Sec. 2, Ch. 319, L. 1967.

26-203. (3683) Repealed—Chapter 267, Laws of 1955.

Repeal

This section (Sec. 3, Ch. 238, L. 1921; Sec. 8, Ch. 59, L. 1927; Sec. 1, Ch. 161, L. 1931), relating to classes of licenses, was repealed by Sec. 5, Ch. 267, Laws 1955. For new provisions, see section 26-202.1.

26-204. (3684) Application for license. Such license shall be procured from the state fish and game warden [director], or any deputy state fish and game warden [state fish and game warden], or any authorized agent of the state fish and game warden [director]. The applicant shall state his name, age, occupation, place of residence, post-office address, the length of time in the state of Montana, whether a citizen of the United States or an alien, and such other facts, data or descriptions as may be required by the commission. The statements made by the applicant shall be subscribed and sworn to before the officer or agent issuing said license.

Any person who shall swear or affirm to any false statement in the application for a hunting or fishing license, shall be guilty of a misdemeanor, and on conviction thereof, shall be punished as provided in section 26-324.

History: En. Sec. 4, Ch. 238, L. 1921; re-en. Sec. 3684, R. C. M. 1921; amd. Sec. 1, Ch. 84, L. 1947.

Compiler's Note

The bracketed words were inserted by

the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

DECISIONS UNDER FORMER LAW

Refusal to Sell License-Liability

The fish and game warden is not liable in damages for failure to sell fishing li-

censes to a particular person. Meinecke v. McFarland, 122 M 515, 206 P 2d 1012.

26-205. (3685) Repealed—Chapter 267, Laws of 1955.

Repeal

This section (Sec. 5, Ch. 238, L. 1921; Sec. 4, Ch. 77, L. 1923; Sec. 1, Ch. 161, L. 1925; Sec. 14, Ch. 192, L. 1925; Sec. 9, Ch. 59, L. 1927; Sec. 2, Ch. 161, L. 1931; Sec. 1, Ch. 174, L. 1939; Sec. 1, Ch. 215, L.

1947; Sec. 1, Ch. 32, L. 1949; Sec. 1, Ch. 142, L. 1951; Sec. 1, Ch. 129, L. 1953), relating to the fees for licenses and the tagging of carcasses, was repealed by Sec. 5, Ch. 267, Laws 1955. For new provisions, see sections 26-202.1 to 26-202.4.

26-205.1. Repealed—Chapter 267, Laws of 1955.

Repeal

This section (Sec. 2, Ch. 126, L. 1953), relating to a special bow and arrow license

for hunting deer, was repealed by Sec. 5, Ch. 267, Laws 1955.

26-206 to 26-208. (3685.1 to 3685.3) Repealed—Chapter **267, Laws of 1955.**

Repeal

These sections (Secs. 1 to 3, Ch. 41, L. 1935; Sec. 1, Ch. 174, L. 1939; Sec. 1, Ch. 215, L. 1947; Sec. 1, Ch. 32, L. 1949; Sec.

1, Ch. 218, L. 1953), relating to temporary nonresident fishing licenses, were repealed by Sec. 5, Ch. 267, Laws 1955.

26-209. (3685.4) Act construed as providing additional nonresident license. This act shall not be construed so as to repeal existing provisions of law for Class B nonresident fishing license, but shall be construed as providing an additional license for nonresidents who wish to limit the period to three days.

History: En. Sec. 5, Ch. 41, L. 1935.

NOTE.—The time limit of license referred to in this section was changed to conform to the latest amendment of section 26-208 (since repealed).

Compiler's Note

Although the title to chapter 185 of Laws 1955 related that it was to repeal section 26-209, among others, yet the body of the act did not list this section as repealed. It would probably be repealed by implication, however, since the other sections of the act (26-206 to 26-208) to which it referred were specifically repealed.

Collateral References

Fish 9. 36A C.J.S. Fish § 27.

26-210. Bounty claims for wild animals—approval and payment. The fish and game commission shall pay bounty claims for wild animals which have been filed, registered and approved in the office of the livestock commission; the state fish and game commission is empowered to and shall pay out of the state fish and game funds other than those funds derived from license fees paid by hunters and fishermen for bounties on predatory wild animals, as such bounty claims are presented, not exceeding seven thousand five hundred dollars (\$7,500.00) per calendar year.

The livestock commission shall, after the filing, registration and approval of the bounty claim or certificate in its office, deliver the same to the office of the state fish and game commission for rejection or approval. If such claim or certificate is rejected it shall be returned by the fish and game commission to the livestock commission and if approved it shall be delivered to the state board of examiners for allowance or disallowance. Provided, however, that nothing herein shall be construed as taking from the fish and game commission the exclusive power to administer said funds at their discretion.

If the state board of examiners approve and allow any such claim or certificate, they must endorse thereon over their signatures, "Approved for the sum of......dollars," and transmit the same to the auditor, and the auditor must draw his warrant on the state fish and game fund for the amount so approved and allowed, in favor of the claimant, or his assigns, in the order in which the same is approved.

History: En. Sec. 2, Ch. 174, L. 1939.

26-211. (3687) Repealed—Chapter 88, Laws of 1947.

26-212. (3688) Form and contents of licenses. The form of the license shall be determined and the license blanks prepared by the commission and by it furnished to the officers and persons authorized to issue the same.

Said licenses shall be issued in the name of the commisson, and be countersigned by the officer or person issuing the same. Each license issued shall be signed by the licensee in ink or indelible pencil on the face thereof.

History: En. Sec. 8, Ch. 238, L. 1921; re-en. Sec. 3688, R. C. M. 1921.

- 26-212.1. Information to be included in big game licenses. The fish and game commission shall include the following tagging and penalty information printed on the back of all big game licenses issued by the commission:
 - (1) Sign your name.
 - (2) Write your home address.
 - (3) Write your county where animal was killed.
 - (4) Cut out day and month of kill; tags detached before kill are invalid.
 - (5) Attach tag to animal carcass.
- (6) Unless you have permission, it is a misdemeanor, punishable by fine or imprisonment or both to hunt on the enclosed land of another or to injure or destroy any fence or other enclosure for the purpose of entering on the land of another.

History: En. Sec. 1, Ch. 165, L. 1967.

26-213. (3689) Carrying and exhibiting license. It shall be unlawful and a misdemeanor punishable as provided by section 26-324 for any person to whom a license or permit has been issued to fish for or take any fish, or pursue, hunt, shoot, kill, or take, any game bird or game animal or attempt to trap, or trap, or take any fur-bearing animal in this state unless at the time he shall have such license or licenses, or permit, in his possession, and it shall be unlawful to refuse to exhibit the same for inspection to any deputy state fish and game warden [state fish and game warden] or other officer requesting to see the same.

History: En. Sec. 9, Ch. 238, L. 1921; re-en. Sec. 3689, R. C. M. 1921; amd. Sec. 10, Ch. 59, L. 1927; amd. Sec. 4, Ch. 224, L. 1947.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

Collateral References

Fish = 10 (1); Game = 5. 36A C.J.S. Fish § 36; 38 C.J.S. Game § 15. 24 Am. Jur. 389, Game and Game Laws, § 22.

26-214. (3690) Termination of license. Such licenses shall be void after the thirtieth day of April next succeeding their issuance.

History: En. Sec. 10, Ch. 238, L. 1921; re-en. Sec. 3690, R. C. M. 1921.

26-215. (3691) Exemption from general provisions. (a) The provisions of the fish and game laws shall not apply to persons pursuing, hunting, capturing, shooting, killing, taking or trapping, or attempting to kill, take or trap predatory animals, prairie dogs, ground squirrels, jackrabbits, gophers, or English sparrows, crows, hawks, fish ducks, blue heron, snow owls, great grey owls, great horned owls, blackbirds, kingfishers, magpies, jays and eagles, which may be pursued, hunted, taken, killed, shot, trapped, possessed or transported at any time except as specifically set forth herein and enforced pursuant to section 26-324.

- (b) It shall be illegal to hunt jackrabbits on private land with artificial light unless written permission of the landowner, lessee or agent is obtained.
- (c) Minors under fifteen (15) years of age may fish for and take fish, during the open season without a license; provided, however, that no nonresident person, under the age of fifteen (15) years, shall fish in or on any Montana waters without first having obtained a Class B, B-2 or B-3 fishing license, unless such nonresident person under the age of fifteen (15) years shall be in the company of an adult in possession of a valid Montana fishing license, provided that the limit of fish for such nonresident person and the accompanying adult combined shall not exceed the limit for one adult as established by law or by regulation of the commission.

History: En. Sec. 11, Ch. 238, L. 1921; L. 1931; amd. Sec. 2, Ch. 148, L. 1963; re-en. Sec. 3691, R. C. M. 1921; amd. Sec. 4, Ch. 48, L. 1965; amd. Sec. 1, 11, Ch. 59, L. 1927; amd. Sec. 3, Ch. 161, Ch. 26, L. 1967.

26-216. (3691.1) Repealed—Chapter 224, Laws of 1947.

26-217. (3692) Alteration or transfer of license. No person shall at any time alter or change in any material manner, or loan or transfer to another, any license issued in pursuance to the provisions of this act, nor shall any person other than the person to whom it is issued use the same. Any person who shall swear or affirm to any false statement in application for a hunting, fishing or trapping license, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished as provided by law. Any false statement contained in any application for such license shall render the license null and void.

History: En. Sec. 12, Ch. 238, L. 1921; re-en. Sec. 3692, R. C. M. 1921; amd. Sec. 1, Ch. 149, L. 1955.

26-218, 26-219. (3693) Repealed—Chapter 267, Laws of 1955.

Repeal

These sections (Sec. 13, Ch. 238, L. 1921; Sec. 1, Ch. 208, L. 1945), relating to reports by deputy fish and game wardens

and residents of the state on furlough from the armed forces hunting and fishing without licenses, were repealed by Sec. 5, Ch. 267, Laws 1955.

26-220. License agents—appointment. The state fish and game warden [director] shall have authority to appoint license agents as needed to sell state hunting and fishing licenses, according to such rules and regulations as the commission shall prescribe.

History: En. Sec. 1, Ch. 88, L. 1947; amd. Sec. 1, Ch. 156, L. 1949.

Compiler's Note

The bracketed word was inserted by the compiler since by sections 26-106.1 and

26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

26-221. Bond of license agent—preferred claim of state for license money. Each appointed license agent shall furnish a corporate surety bond in an amount equal to one thousand dollars (\$1,000.00), or in an amount equal to the value of the licenses received for distribution, said amount to be fixed at the discretion of the state fish and game warden [director]. Said bond shall secure the faithful performance of the duties imposed on the

license agent, the accounting for and payment of all moneys received from the sale of hunting and fishing licenses to the state of Montana and that such license agent shall properly account for all unsold licenses annually on April 1st, or at any other time at the request of the state fish and game warden [director].

All money received for the sale of licenses shall at all times belong to the state of Montana, and in case of an assignment for the benefit of creditors, receivership or bankruptcy, the state of Montana shall have a preferred claim against the assets and estate of said license agent for all moneys owing the state of Montana.

History: En. Sec. 2, Ch. 88, L. 1947; amd. Sec. 1, Ch. 156, L. 1949.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1

and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

26-222. Compensation—duties. License agents, except salaried deputy fish and game wardens (state fish and game wardens), shall receive for all services rendered the sum of fifteen cents (15¢) for each license issued. On or before the 10th day of each month each license agent shall submit to the state fish and game warden (director) all duplicates of each class of licenses sold during the preceding month and shall accompany such duplicate licenses with lawful remittance of all moneys received for the sale thereof, less a fee of fifteen cents (15¢) for each license sold. Each license agent shall keep his license account open to inspection at all reasonable hours by the state fish and game commission, the state fish and game warden (director), or his deputies (wardens), or the state examiner.

History: En. Sec. 3, Ch. 88, L. 1947; amd. Sec. 1, Ch. 156, L. 1949; amd. Sec. 1, Ch. 31, L. 1959.

26-223. Appointments nontransferable — revocation—oaths. Appointments of license agents shall be nontransferable, and shall be valid only while the licensee is in the business, or in the employ of the business concern for which appointment has been made, and may be summarily revoked at any time by the state fish and game warden [director] for noncompliance with the provisions of this act or other regulations. Duly appointed license agents are hereby authorized to administer oaths to applicants for hunting and fishing licenses.

History: En. Sec. 4, Ch. 88, L. 1947; amd. Sec. 1, Ch. 156, L. 1949.

Compiler's Note

The bracketed word was inserted by the compiler since by sections 26-106.1 and

26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

26-224. Prior appointments affected. All appointments of, or authorizations to, persons or corporations to sell hunting and fishing licenses issued prior to the passage of this act shall be subject to the provisions hereof.

History: En. Sec. 5, Ch. 88, L. 1947;

History: En. Sec. 5, Ch. 88, L. 19 amd. Sec. 1, Ch. 156, L. 1949.

26-225. Reciprocal fishing privileges of licensees of bordering states—agreements authorized. Any person who is properly licensed to fish in a

state which borders the state of Montana and who complies with Montana fish and game laws and regulations may fish in any part of a lake, reservoir, pond or body of water in Montana that lies within or partly within ten (10) miles of the boundaries of this state, when such water is declared to be open to fishing by the state fish and game commission, provided, however, that such bordering state grants the same or similar privileges in any such body or bodies of water or in all lakes, reservoirs, ponds or bodies of water similarly defined within its boundaries to holders of valid Montana fishing licenses, and provided further that such state enters into a reciprocal agreement with Montana setting forth terms as provided by this act. The state fish and game commission is authorized to enter into reciprocal agreements with corresponding state officials of adjoining states for purposes of providing such reciprocal fishing privileges upon any body or bodies of water as described above. Such agreements may include provisions by which each state shall honor the license of the other state only when there is affixed to such license a stamp purchased from the honoring state, the charge for such stamp being set by mutual agreement of the states.

History: En. Sec. 1, Ch. 14, L. 1965.

26-226. Devices and equipment used under reciprocal privilege. The state fish and game commission may, by regulation, authorize use of by properly licensed fishermen of both states, of fishing devices and equipment, unless otherwise prohibited by Montana law, in waters forming the subject of such agreements.

History: En. Sec. 2, Ch. 14, L. 1965.

26-227. Bodies of water covered by reciprocal privileges. It is the primary purpose of this section to provide a method whereby the fishing opportunities afforded upon any part of any body of water located within or partly within ten (10) miles of the boundaries of this state may be mutually enjoyed by the residents of Montana and the residents of such adjoining states and it is not intended to cover the waters of rivers or

History: En. Sec. 3, Ch. 14, L. 1965.

26-228. Rules and regulations to implement reciprocal agreements violations. The state fish and game commission is hereby authorized to establish rules and regulations for the purpose of implementing said agreements. Any person violating any orders or regulations promulgated by the state fish and game commission under this act shall, upon conviction, be deemed guilty of a misdemeanor and shall be punished as provided in section 26-324.

History: En. Sec. 4, Ch. 14, L. 1965.

CHAPTER 3

RESTRICTIONS ON TAKING FISH AND GAME—OPEN AND CLOSED SEASONS

Section 26-301. Restrictions of manner of taking and possessing fish and game and powers of commission relating thereto. Big game hunters to wear colored garments.

Penalty.

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26-303.1. Big game hunting by nonresidents—policy of state.
26-303.2. Resident to accompany nonresident hunting big game—exception. 26-303.3. Permission of landowner or lessee required for big game hunting.
26-303.4. Big game hunting violations.
26-304. Repealed.
26-305.
         Repealed.
26-306. Private artificial lake or pond-stocking-license-bond-reports-re-
            strictions on catching fish-penalty for violation.
26-307.
          Waste of fish or game-hunting or fishing during closed season-
            killing more than one game animal-exceptions for bear.
26-307.1. Penalty.
26-308 to 26-314. Repealed.
          Taking deer within boundaries of cities or towns unlawful-penalty.
26-316.
          Repealed.
          Destroying evidence of sex constitutes misdemeanor.
26-317.
26-318.
          Repealed.
26-319.
         Penalty for violating closed season on certain game birds-power of
            commission to open season.
26-320.
         Closed season and bag limits on migratory game birds.
26-321.
          Closed and open season for fur-bearing animals.
26-322.
          Repealed.
26-323.
         Repealed.
         Penalty.
26-324.
26-325 to 26-329.
                    Repealed.
26-330. Federal government may conduct fish-hatching operations in state.
26-331. Sale of fish or spawn prohibited—exceptions.
26-332. Method of catching fish—use of traps, seines and nets—restrictions concerning possession and sale of fish.
          Record of seining licenses—refusal of license.
          Unlawful to possess net or seine-exceptions.
26-334.
         Use of explosives or poisons in taking fish unlawful-penalty-excep-
26-335.
            tions.
26-336. Definition and use of lakes as navigable waters.
26-337.
          Navigable streams.
          Navigable and public waters open to fishing.
         Dumping refuse from sawmill into streams.
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- 26-340 to 26-343. Repealed. 26-344. Restrictions on use of fish as bait—commission must authorize introduction of fish or game.
- 26-301. (3694) Restrictions of manner of taking and possessing fish and game and powers of commission relating thereto. 1. It shall be unlawful for anyone to take, capture, shoot, kill, or attempt to take, capture, shoot or kill, any game animal, or game bird from any self propelled or drawn vehicle, or on, or from any public highway in the state of Montana, or by the aid or with the use of any set gun, jack-light, or other artificial light, trap, snare, salt lick, nor shall any such set gun, jack-light or other artificial light, trap, snare, salt lick or other device to entrap or entice game animals or game birds be used, made or set, nor may rifles be used to hunt or shoot upland game birds unless the use of rifles is permitted by the commission; provided, however, that this does not prohibit the shooting of wild waterfowl from blinds over decoys with a shotgun only, not larger than a number ten (10) gauge fired from the shoulder, nor shall any game fish be caught, captured, or taken, or attempted to be caught, captured or taken by the aid or with the use of any gun, or trap, nor shall any such set gun, or trap or other device to entrap game fish be used, made, or set.
- 2. (a) No game birds or game or fur-bearing animals shall be killed, taken or shot at from any aircraft, nor shall any aircraft be used for the purpose of concentrating, pursuing, driving, rallying or stirring up any

game or migratory birds, game or fur-bearing animals, nor shall any powerboat, sailboat, or any boat under sail or any floating device towed by a powerboat, sailboat, or any boat under sail be used for the purpose of killing, capturing, taking, pursuing, concentrating, driving or stirring up any game birds, or migratory waterfowl, or game or fur-bearing animals.

- (b) No person in an aircraft in the air shall spot or locate any game, or migratory bird, game or fur-bearing animals and communicate the location or approximate location thereof by any signals whatsoever, whether radio, visual or otherwise, to any person or persons then on the ground.
- 3. No person shall take into a field or forest, or have in his possession while out hunting, any device or mechanism devised to silence or muffle or minimize the report of any firearms, whether such device or mechanism be operated from or attached to any firearm.
- 4. No person may use a shotgun to hunt, kill or shoot deer except with loads as specified by the commission.
- 5. No person shall chase with dogs any of the game or fur-bearing animals as defined by the fish and game laws of this state; provided, however, that livestock owners, employees of the state fish and game commission and of the federal fish and wildlife service may use dogs in pursuit of stock-killing bears, or other means of taking stock-killing bears except the use of the dead fall; providing, however, that traps used in capturing bear shall be inspected twice each day, which inspection shall be twelve (12) hours apart; and provided further, that a person may take game birds during the open season thereon with the aid of a dog or dogs and any person or association organized for the protection of game, may run field trials at any time upon obtaining written permission from the state fish and game director.
- 6. The state fish and game commission shall have the power to designate certain waters where set lines may be used to fish for certain species of game or nongame fish, and the commission may designate the number of hooks and lines and the length of line or lines which may be used as set lines.
- 7. Game fish shall be taken only by angling, that is by hook and single line in hand or single rod in hand, or within immediate control; this does not prevent, however, the snagging of paddlefish, coho (silver salmon), and kokanee (sockeye salmon) when the commission shall declare an open season when paddlefish, coho (silver salmon), and kokanee (sockeye salmon) may be taken by snagging, the taking of paddlefish with long bow and arrow when the commission shall declare an open season when paddlefish may be taken by long bow and arrow, nor the use of landing net or gaff to land a game fish after the same has been hooked by angling as above specified, nor does it prevent the taking of minnows other than game fish variety by the use or aid of a net not to exceed twelve (12) feet in length and four (4) feet in width, in such waters as may be designated by the commission.
- 8. Whenever said fish and game commission shall have made any orders, rules or regulations for the carrying out of the powers granted to it under this act, the same shall take effect and be in force from and

after the publication and posting of notice of said orders, rules and regulations as required by the fish and game laws.

Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and shall be punishable as provided by law.

History: En. Sec. 14, Ch. 238, L. 1921; re-en. Sec. 3694, R. C. M. 1921; amd. Sec. 5, Ch. 77, L. 1923; amd. Sec. 15, Ch. 192, L. 1925; amd. Sec. 12, Ch. 59, L. 1925; amd. Sec. 1, Ch. 1931; amd. Sec. 1, Ch. 159, L. 1931; amd. Sec. 1, Ch. 159, L. 1941; amd. Sec. 5, Ch. 224, L. 1947; amd. Sec. 1, Ch. 157, L. 1949; amd. Sec. 1, Ch. 126, L. 1951; amd. Sec. 1, Ch. 223, L. 1953; amd. Sec. 1, Ch. 193, L. 1955; amd. Sec. 1, Ch. 53, L. 1963; amd. Sec. 1, Ch. 34, L. 1967.

Cross-Reference

Shooting from or across highways prohibited, sec. 32-21-113.

Collateral References

Fish = 31 (1), (2); Game 7. 36A C.J.S. Fish §§ 29, 30; 38 C.J.S. Game §§ 11, 12.

Right of public to fish in stream notwithstanding objection by riparian owner. 47 ALR 2d 381.

Right created by private grant or reservation to fish on another's land. 49 ALR 2d 1395.

Validity of prohibition or regulation of fishing, to protect public water supply. 56 ALR 2d 790.

Entrapment with respect to violation of game laws. 75 ALR 2d 709.

26-302. Big game hunters to wear colored garments. It shall be unlawful for any person to hunt any of the big game animals in this state under any of the provisions of the laws of this state without such person wearing as an exterior garment, a cap or hat, shirt jacket, coat or sweater of a bright red, orange or yellow color.

History: En. Sec. 1, Ch. 74, L. 1937; amd. Sec. 1, Ch. 12, L. 1961.

26-303. Penalty. Any person convicted of a violation of any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than two dollars and fifty cents (\$2.50) or more than five dollars (\$5.00).

History: En. Sec. 2, Ch. 74, L. 1937.

26-303.1. Big game hunting by nonresidents—policy of state. It shall be the policy of this state to protect and preserve game animals primarily for the citizens of this state and to avoid the deliberate waste of wildlife and destruction of property by nonresidents licensed to hunt in this state.

History: En. Sec. 1, Ch. 229, L. 1965.

26-303.2. Resident to accompany nonresident hunting big game—exception. It shall be unlawful for any nonresident to hunt big game animals in this state unless he is accompanied by a resident licensed to hunt game animals, provided that a nonresident need not be accompanied when hunting in special deer or antelope areas as designated by the state fish and game commission.

History: En. Sec. 2, Ch. 229, L. 1965.

26-303.3. Permission of landowner or lessee required for big game hunting. Every resident and nonresident must have obtained permission of the landowner, lessee or their agents before hunting big game animals on private property.

History: En. Sec. 3, Ch. 229, L. 1965.

26-303.4. Big game hunting violations. Any person violating any provision of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished as provided in section 26-324.

History: En. Sec. 4, Ch. 229, L. 1965.

26-304. (3694.1) Repealed—Chapter 159, Laws of 1955.

Repeal

This section (Sec. 14, Ch. 238, L. 1921; Sec. 5, Ch. 77, L. 1923; Sec. 15, Ch. 192, L. 1925; Sec. 12, Ch. 59, L. 1927; en. as Sec. 2, Ch. 162, L. 1931), containing a penalty provision, was repealed by Sec. 2, Ch. 159, Laws 1955. For new general penalty provision, see sec. 26-324.

26-305. (3694.2) Repealed—Chapter 172, Laws of 1951.

Repeal

This section (Sec. 1, Ch. 108, L. 1945).

defining "public highway," was repealed by Sec. 1, Ch. 172, Laws 1951.

26-306. (3695) Private artificial lake or pond—stocking—license bond—reports—restrictions on catching fish—penalty for violation. Any person who owns or lawfully controls an artificial lake or pond may apply to the state fish and game warden [director] for a fish pond license. Any holder of a private fish pond license may stock such fish pond with fry procured from any lawful source provided that the state fish and game commission may designate the species of fish which may be released in said pond when said pond is so located that there is a possibility of fish escaping from the pond into adjacent streams or lakes. Such private pond license holder shall have the right to take fish from said lake or pond in any manner. Before any private pond license holder may sell fish or eggs or fry therefrom, he shall be required to furnish a corporate surety bond to the state of Montana in the sum of five hundred dollars (\$500.00), conditioned to the effect that he will not sell fish or spawn taken from fish caught in any of the public waters of this state, and also conditioned to the effect that he will report to the state fish and game warden [director] the quantity of fish, fish eggs, and spawn taken from said lake or pond, said report to be made under oath annually during the month of January each year. A record of all transactions must be kept showing the species and numbers or pounds of fish sold, number and species of eggs sold, number and species of fry sold, name of person or persons to whom sold and date of transaction.

The term "artificial lake or pond" as herein used shall not be construed to include any natural pond or body of water created by natural means, nor any portion of the stream bed or of the lake bed thereof, but shall be limited only to such bodies of water created by artificial means or diversion of water and shall not exceed five hundred acres (500) of surface area.

Any person or persons violating any provision of the act shall be guilty of a misdemeanor and upon conviction thereof shall be punished as provided for in section 26-324.

History: En. Sec. 14A, Ch. 238, L. 1921; re-en. Sec. 3695, R. C. M. 1921; amd. Sec. 6, Ch. 77, L. 1923; amd. Sec. 1, Ch. 43, L. 1929; amd. Sec. 1, Ch. 125, L. 1949.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens. Collateral References Fish \$\infty\$ 5 (1), 10 (1). 36A C.J.S. Fish \square\square\square\q

26-307. (3696) Waste of fish or game—hunting or fishing during closed season—killing more than one game animal—exceptions for bear. (1) It shall be unlawful and a misdemeanor for any person responsible for the death of any game animal of this state, excepting grizzly, black and brown bear, to detach or remove from the carcass only the head, hide, antlers, tusks or teeth, or any or all of aforesaid parts, or to waste any part of any game animal, game bird, or game fish suitable for food, or to abandon the carcass of any game animal in the field, except grizzly, black and brown bear, which need have removed and taken from the carcass only the head or the hide of such bear.

- (2) It shall be unlawful and a misdemeanor for any person to kill more than one game animal of any one species, in any one license year, unless the killing of more than one game animal of such species has been authorized by regulations of the fish and game commission.
- (3) It shall be unlawful and a misdemeanor for any person during the closed season on any species of game animal, game bird or fish to take, hunt, shoot, kill or capture any such game animal or such game bird or to fish for or catch any such fish.

History: En. Sec. 15, Ch. 238, L. 1921; re-en. Sec. 3696, R. C. M. 1921; amd. Sec. 7, Ch. 77, L. 1923; amd. Sec. 16, Ch. 192, L. 1925; amd. Sec. 13, Ch. 59, L. 1927; amd. Sec. 1, Ch. 152, L. 1931; amd. Sec. 1, Ch. 160, L. 1941; amd. Sec. 1, Ch. 158, L. 1955; amd. Sec. 1, Ch. 40, L. 1961.

Mere Trespass by Elk No Justification for Killing

In a prosecution for the killing of elk out of season, justification cannot be based upon a mere trespass by the animals, and one who acquires ranch property in the state does so with notice of the presence of wild game and presumably is cognizant of its natural habits, and where defendant pleads justification, the question of the sufficiency of the testimony to show that herds of such animals had repeatedly damaged his property and that future trespasses would virtually amount to confiscation, is one of fact for the jury. State v. Rathbone, 110 M 225, 241, 100 P 2d 86.

No Redress from State for Damage Done by Wild Elk

One killing an elk out of season in defense of his property has no redress, in the absence of any provision in the fish and game code authorizing him to do so, for past damages occasioned by their trespasses, since such animals are the property of the state and it may not be sued by an individual for damages without its consent. State v. Rathbone, 110 M 225, 237, 100 P 2d 86.

Regulation Subject to Constitutional Guaranties

On appeal from a conviction of killing an elk out of season, defendant's defense was predicated upon the constitutional guaranties under sections 3, 13, and 29, article III of the constitution of the right to enjoy and defend one's property; held, under the facts presented, that legal justification may always be interposed as a defense by a person charged with killing a wild animal contrary to law, and that the general law on the right to use force, section 64-210, must be construed in pari materia with this section when found inoperative, otherwise this section would be unconstitutional as denying an inalienable right. Reversed and remanded for a new trial. State v. Rathbone, 110 M 225, 237, 100 P 2d 86.

References

Rosenfeld v. Jakways, 67 M 558, 563, 216 P 776.

Collateral References

Game \$3½.
38 C.J.S. Game § 7.
24 Am. Jur. 388, Game and Game Laws,
§ 21.

Power of game or fish commission to open or close season. 34 ALR 832.
Rights of fishing in inland lakes. 57 ALR 2d 569.

Applicability to domesticated or captive game, of game laws relating to closed season and the like. 74 ALR 2d 974.

DECISIONS UNDER FORMER LAW

Commission Empowered To Lengthen Hunting Season

A temporary order restraining the state fish and game commission from putting into effect its order lengthening the hunting season on elk in a certain locality, thus modifying this section fixing the season was improper since under section 26-104, declaring that the statutes governing "such

subjects" should continue in force and effect except as altered or modified by the rules and regulations of the commission, the legislature so empowered the commission, amounting to modification of existing statutes. State ex rel. Fish and Game Commission of Montana v. District Court, 107 M 289, 292, 84 P 2d 798.

26-307.1. Penalty. Any person violating any of the provisions of this section or any of the orders of the state fish and game commission shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 26-324.

History: En. Sec. 2, Ch. 158, L. 1955.

26-308. (3696.1) Repealed—Chapter 102, Laws of 1949.

Repeal

This section (Sec. 1, Ch. 32, L. 1929; Sec. 1, Ch. 152, L. 1931), specifying the open

season for elk in Teton county, was repealed as Sec. 3696.1, Revised Codes 1935 by Sec. 1, Ch. 102, Laws 1949.

26-309, 26-310. (3696.2, 3696.3) Repealed—Chapter 153, Laws of 1955.

Repeal

These sections (Secs. 2, 3, Ch. 32, L. 1929; Sec. 1, Ch. 152, L. 1931; Sec. 6, Ch.

224, L. 1947), relating to the taking of elk, were repealed by Sec. 3, Ch. 158, Laws 1955.

26-311. (3696.4) Repealed—Chapter 3, Laws of 1953.

Repeal

This section (Sec. 1, Ch. 1, L. 1935; Sec. 1, Ch. 96, L. 1943; Sec. 1, Ch. 105, L. 1947),

relating to the open season for elk in Park county, was repealed by Sec. 1, Ch. 3, Laws 1953.

26-312 to **26-314**. (3696.5, 3696.6, 3697) Repealed—Chapter **158**, Laws of **1955**.

Repeal

These sections (Sec. 16, Ch. 238, L. 1921; Sec. 8, Ch. 77, L. 1923; Sec. 17, Ch. 192, L. 1925; Sec. 13a, Ch. 59, L. 1927; Sec. 1, Ch. 128, L. 1929; Sec. 2, Ch. 152, L. 1931; Sec. 2, Ch. 152, L. 1933; Secs. 2, 3, Ch. 1, L. 1935; Sec. 1, Ch. 161, L. 1941), relating to the taking of elk in Park county and an open season on deer, were repealed by Sec. 3, Ch. 158, Laws 1955.

26-315. (3697.1) Taking deer within boundaries of cities or towns unlawful—penalty. It shall be unlawful to shoot, kill, take, or cause to be shot, killed, taken or captured, or to attempt to shoot, kill, take or capture, any deer within the boundaries of any incorporated or unincorporated city or town of this state.

Any person violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars (\$25) nor more than five hundred dollars (\$500), or by imprisonment in the county jail for a period of not less than ten (10) days nor more than one hundred and eighty (180) days, or by both such fine and imprisonment, and in addition thereto shall forfeit his fish and game license for a period of one (1) year.

History: En. Sec. 2, Ch. 123, L. 1933.

26-316. (3697.2) Repealed—Chapter 224, Laws of 1947.

26-317. (3698) Destroying evidence of sex constitutes misdemeanor. Any person killing any big game animal within this state who shall destroy such evidence of the sex of any big game animal so killed, as to make the determination of the sex thereof uncertain, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished as provided in section 26-324.

History: En. Sec. 16a, Ch. 238, L. 1921; 18, Ch. 192, L. 1925; amd. Sec. 7, Ch. 224, amd. Sec. 3698, R. C. M. 1921; amd. Sec. L. 1947; amd. Sec. 1, Ch. 99, L. 1949.

26-318. (3699) Repealed—Chapter 158, Laws of 1955.

Repeal

This section (Sec. 17, Ch. 238, L. 1921; Sec. 9, Ch. 77, L. 1923; Sec. 19, Ch. 192, L. 1925), relating to the closed season on Rocky Mountain sheep and goats, was repealed by Sec. 3, Ch. 158, Laws 1955.

26-319. (3700) Penalty for violating closed season on certain game birds—power of commission to open season. It shall hereafter be unlawful for any person to hunt, shoot, kill, capture, or cause to be hunted, killed or captured or attempts to shoot, kill, or capture any quail, Chinese or Mongolian pheasants, commonly called ringneck pheasants, Hungarian partridge, chukar partridge, sage grouse, sharptailed grouse, blue grouse, fool hen, prairie chicken, ruffed grouse, ptarmigan or wild turkey until such time as the commission shall provide an open season on any quail, Chinese or Mongolian pheasants, commonly called ringneck pheasant, Hungarian partridge, chukar partridge, sage grouse, sharptailed grouse, blue grouse, fool hen, prairie chicken, ruffed grouse, ptarmigan or wild turkey.

Any person violating any of the provisions of this act or any person who has in his possession any of such birds or any part of any such birds, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars (\$50.00), nor more than two hundred fifty dollars (\$250.00), or by imprisonment in the county jail for not more than sixty (60) days, or by [both] such fine and imprisonment.

History: En. Sec. 18, Ch. 238, L. 1921; re-en. Sec. 3700, R. C. M. 1921; amd. Sec. 10, Ch. 77, L. 1923; amd. Sec. 20, Ch. 192, L. 1925; amd. Sec. 14, Ch. 59, L. 1927; amd. Sec. 1, Ch. 134, L. 1951.

Compiler's Note

The bracketed word "both" was added by the compiler.

References

Rosenfeld v. Jakways, 67 M 558, 563, 216 P 776.

26-320. (3703) Closed season and bag limits on migratory game birds. Laws relating to migratory birds are prescribed by the regulations of the United States department of interior and the fish and wildlife service. Open season, bag limit and other rules and regulations are announced each year by proclamation by the president of the United States. After each proclamation, the state fish and game commission by proper action will adopt, advertise and enforce such proclaimed regulations as may be applicable to the state of Montana. Any person or persons violating any provisions of this act shall be guilty of a misdemeanor and on conviction thereof shall be punished as provided by law.

History: En. Sec. 20, Ch. 238, L. 1921; L. 1927; amd. Sec. 1, Ch. 162, L. 1941; re-en. Sec. 3703, R. C. M. 1921; amd. Sec. amd. Sec. 1, Ch. 113, L. 1955. 13, Ch. 77, L. 1923; amd. Sec. 16, Ch. 59,

(3704) Closed and open season for fur-bearing animals. It shall hereafter be unlawful and a misdemeanor for any person to shoot, trap, kill or capture, or cause to be shot, trapped, killed, or captured, or attempt to shoot, trap, kill, or capture any marten or sable, otter, mink, muskrat, beaver, fisher, Canada lynx or black-footed ferret until such time as the commission shall provide an open season on any marten or sable, otter, mink, muskrat, beaver, fisher, Canada lynx or black-footed ferret; provided, however, that when it is shown that muskrats or beaver are doing severe injury upon, or are a menace to the structures, canal banks or other works of an irrigation project or district, or stock water pond, any employee or resident landowner on such project or district may kill or trap or cause to be killed or trapped any muskrat or beaver upon or in menacing proximity to the structures, canal banks or other works of such project or district or stock water pond during the closed season on muskrats or beaver, after having secured from the state fish and game director a permit so to do, except that from June first to August thirtyfirst, both dates inclusive, of each year, no such permit shall be required. The furs and hides of such animals, legally taken during the open season, may be possessed, bought and sold at any time except as hereinafter provided.

Any person trapping marten during the open season thereon shall present all skins or pelts of marten so taken to the game warden residing in the district where the pelts were taken, and shall furnish an affidavit, giving his name, residence, license number, the date and place of capture, and the number of marten so taken, and if the warden is satisfied of the legal taking of the same, he shall attach a numbered metal tag to each skin covered by the affidavit; no charge shall be made for tags and the pelts so tagged may be bought, sold or transported at any time within the state of Montana, but no marten skin shall be exported in any manner from the state without the shipper first obtaining a shipping permit from the state fish and game director, or game warden, the application for which shall show the number on the metal tags attached to said marten skins.

Any person who shall receive or bring into from without the state any marten skin or skins with a numbered metal tag of another state or untagged marten skins coming from without the state where the state in which the marten skins were caught does not require that metal tags be attached before shipment, shall report their arrival within ten (10) days to the state fish and game director and furnish an affidavit setting forth the number of skins, the date of receipt, the name and address of the person from whom procured, the manner or method of transportation into the state, and the numbers designated from the tags, and the name of the state so tagging the same, and it shall not be necessary for such skins to be retagged with a Montana tag nor any other fees paid therefor.

It shall be a misdemeanor, punishable as hereinafter provided, for any person to remove any tag from such skins or to buy, sell or transport untagged marten skins, except as provided in this act, or fail to have tags attached to marten skins as herein provided within twenty (20) days of the expiration date of the open season thereon.

It shall be unlawful and punishable, as in this act hereinafter provided,

for any person at any time to willfully destroy, open or leave open, or partially destroy a house of any muskrat or beaver except that this shall not prohibit trapping in the house of muskrats when the commission shall authorize such trapping.

Any person trapping fur-bearing animals or predatory animals for their pelts shall fasten a metal tag to all such traps bearing in legible English the name and address of the trapper, except that no tag shall be required on traps used by landowners trapping with permit on their own land, and irrigation ditch right of way contiguous to the land.

Any person violating any of the provisions hereof shall be guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law.

History: En. Sec. 21, Ch. 238, L. 1921; re-en. Sec. 3704, R. C. M. 1921; amd. Sec. 14, Ch. 77, L. 1923; amd. Sec. 22, Ch. 192, L. 1925; amd. Sec. 17, Ch. 59, L.

1927; amd. Sec. 1, Ch. 95, L. 1943; amd. Sec. 8, Ch. 224, L. 1947; amd. Sec. 1, Ch. 132, L. 1955; amd. Sec. 1, Ch. 69, L. 1961.

26-322. (3704.1) Repealed—Chapter 267, Laws of 1955.

Repeal
This section (Sec. 1, Ch. 128, L. 1933),

relating to a trapper's license, was repealed by Sec. 5, Ch. 267, Laws 1955.

26-323. (3705) Repealed—Chapter 185, Laws of 1955.

Repeal

This section (Sec. 22, Ch. 238, L. 1921), relating to costs in county prosecution of

violators of fish and game laws, was repealed by Sec. 1, Ch. 185, Laws 1955.

26-324. (3706) Penalty. Any person violating any provision of any statute of the state of Montana pertaining to fish and game, including the provisions of sections 26-101 to 26-1306, and all acts amendatory thereof, or supplementary thereto, or the orders, rules and regulations of the fish and game commission made pursuant to the authority given it under the law, shall, unless a different punishment is expressly provided by law for such violation, be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than five hundred dollars, (\$500.00), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment, and in addition thereto such person shall, in the discretion of the court, forfeit his license and privilege to hunt, fish or trap within this state for a period of sixteen (16) months from the date of his or her conviction; [or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment, and in addition thereto such person shall in the discretion of the court, forfeit his license and privilege to hunt, fish or trap within this state for a period of sixteen (16) months from the date of his or her conviction].

History: En. Sec. 23, Ch. 238, L. 1921; re-en. Sec. 3706, R. C. M. 1921; amd. Sec. 23, Ch. 192, L. 1925; amd. Sec. 9, Ch. 224, L. 1947; amd. Sec. 1, Ch. 159, L. 1955.

Compiler's Note

The material in brackets was enclosed

in the brackets to show that it is a duplication.

Failure To Tag Deer

Where plaintiff lawfully killed a deer but failed to fill out the tag attached to his hunting license and attach it to the carcass, the deer was not unlawfully possessed and the game warden was without authority to seize and confiscate the carcass when he arrested plaintiff for failure to attach the tag. Shipman v. Todd, 131 M 365, 310 P 2d 300.

Collateral References Fish = 13 (1); Game = 7. 36A C.J.S. Fish § 29; 38 C.J.S. Game §§ 11-13.

(3707) Repealed—Chapter 88, Laws of 1947.

26-326 to 26-329. (3708 to 3711) Repealed—Chapter 185, Laws of 1955.

These sections (Secs. 1 to 4, Ch. 38, L. 1913; Sec. 1, Ch. 121, L. 1947; Sec. 10,

Ch. 224, L. 1947), relating to alien gun licenses, were repealed by Sec. 1, Ch. 185, Laws 1955.

26-330. (3712) Federal government may conduct fish-hatching operations in state. The government of the United States, the United States commissioner of fisheries, and its or his duly authorized agent or agents, be and they are hereby authorized, empowered and granted the right to conduct fish-hatching and all operations connected therewith, in any manner and at any time that may by them, or any of them, be considered necessary and proper, at any United State fish cultural station that may hereafter be established by the United States government in the state of Montana.

History: En. Sec. 1, Ch. 9, L. 1913; re-en. Sec. 3712, R. C. M. 1921.

Collateral References Fish@=12. 36A C.J.S. Fish § 28.

(3713) Sale of fish or spawn prohibited—exceptions. Every person who in any way catches any of the fish which in this act are classified as "game fish" or who shall remove or cause to be removed the eggs or spawn of any such fish for speculative purposes, for market or for sale, or who shall sell or offer for sale any of the game fish of this state as in this act defined, or the eggs or spawn therefrom shall be deemed guilty of a misdemeanor and shall be punishable as provided by section 26-324, provided, however, that this section shall not apply to fish caught in private ponds by the owners thereof nor to the taking of fish by the state authorities for the purpose of obtaining eggs for propagation in state fish hatcheries, or by any person who receives a permit from the state fish and game commission to take eggs for said purposes.

History: En. Sec. 21, Ch. 173, L. 1917; re-en. Sec. 3713, R. C. M. 1921; amd. Sec. 11, Ch. 224, L. 1947.

Collateral References Fish \$\infty\$13 (1). 36A C.J.S. Fish § 28. 22 Am. Jur. 704, Fish and Fisheries,

(3714) Method of catching fish—use of traps, seines and nets -restrictions concerning possession and sale of fish. Every person who takes or catches fish in any of the waters of this state except with hook and line held in hand or line and hook attached to rod or pole held in hand, or who takes or catches fish with hook baited with any poisonous substance or by means of the use of any poisonous substance, including fish berries, or who takes or catches fish by means of the use of fish traps, grab hooks, seines, nets, or other similar means for catching fish, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished as provided for in section 26-324, and the amendments thereto; provided, however, that the Montana fish and game commission shall have the power, authority, and jurisdiction, to designate such waters within the state of Montana, wherein, in the judgment of the members of said commission, traps, seines, or nets, and rubber or spring propelled spears when employed by sportsmen swimming or submerged in the water, may be used for the taking of designated species of nongame fish and to close such waters so designated at the discretion of the commission, and to permit the taking of black bass in Flathead Lake, the taking of all fish by said means in said waters when so designated to be done under such rules and regulations as said commission may prescribe with reference thereto, and under the supervision of said commission, and all such fish so taken may be possessed and sold in such manner and under such restrictions as said commission may direct, all fish other than those herein designated so taken under said rules and regulations when prescribed by said commission, shall be returned uninjured to the waters from which they were taken.

History: En. Sec. 22, Ch. 173, L. 1917; re-en. Sec. 3714, R. C. M. 1921; amd. Sec. 16, Sec. 77, L. 1923; amd. Sec. 25, Ch. 192, L. 1925; amd. Sec. 18, Ch. 59, L. 1927; amd. Sec. 1, Ch. 44, L. 1959.

Complaint

Complaint charging offense of unlawfully

taking fish from stream held sufficient. State v. Russell, 52 M 583, 584, 160 P 655.

Collateral References

Fish \$\infty\$ 13 (2). 36A C.J.S. Fish \$ 30.

22 Am. Jur. 702, Fish and Fisheries, § 48.

26-333. (3715) Record of seining licenses—refusal of license. It shall be the duty of the state game warden [director] to keep a record of all licenses issued by him for the use of a net for the taking of fish, showing the name of the applicant, the date of issue, the waters to be used in, and when revoked (should same be so revoked), and to pay all fees received for such licenses into the state treasury to the credit of the fish and game fund. Should an application be made for a license by any person who has theretofore had a license revoked for cause, it shall be the duty of the state game warden [director] to refuse the same, and no license shall be issued to any person whose license has been revoked for cause.

History: En. Sec. 23, Ch. 173, L. 1917; re-en. Sec. 3715, R. C. M. 1921.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1

and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

26-334. (3716) Unlawful to possess net or seine—exceptions. It is unlawful for any person or persons to have in their possession or under their control any seine, net or other similar device for capturing fish. A seine or net found in any vehicle, at the camp, or on the premises of any person shall be prima facie evidence that the said seine, net or similar device belongs to the person or persons occupying said camp or premises; provided, that nothing herein contained shall apply to the owners of private fish ponds, as defined under the statute, nor to a person or persons having unexpired seine or net license, as provided for in the statutes of Montana; provided, further, that nothing herein contained shall apply to the use, by any person, of a landing net used in connection or in addition to pole, line and hooks, in fishing for game fish; and provided, further, that nothing herein con-

tained shall apply to the possession of traps, seines or nets where found in the vicinity of any waters which the fish and game commission have designated within the state, where traps, seines or nets may be used for the taking of nongame fish and Dolly Varden trout, as provided for in the statutes of Montana.

History: En. Sec. 25, Ch. 173, L. 1917; re-en. Sec. 3716, R. C. M. 1921; amd. Sec. 1, Ch. 113, L. 1933.

Collateral References Fish ≈ 13 (2). 36A C.J.S. Fish § 30.

26-335. (3717) Use of explosives or poisons in taking fish unlawful—penalty—exceptions. If any person or persons shall use any carbide, lime, giant powder, dynamite, or other explosive compounds, or any corrosive or narcotic poison or other deleterious substance, or have any of the same in his possession within one hundred (100) feet of any stream where fish are found, for the purpose of catching, stunning or killing fish, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law. The provisions of this section shall not apply to anyone duly authorized by the Montana fish and game commission to conduct lake or stream surveys or to control undesirable or overpopulated species of fish.

History: En. Sec. 26, Ch. 173, L. 1917; re-en. Sec. 3717, R. C. M. 1921; amd. Sec. 24, Ch. 192, L. 1925; amd. Sec. 1, Ch. 82, L. 1933; amd. Sec. 1, Ch. 101, L. 1949; amd. Sec. 1, Ch. 114, L. 1955.

26-336. (3717.1) Definition and use of lakes as navigable waters. All lakes, wholly or partly within this state, which have been meandered and returned as navigable by the surveyors employed by the government of the United States, and all lakes which are navigable in fact are hereby declared to be navigable and public waters, and all persons shall have the same rights therein and thereto that they have in and to any other navigable or public waters.

History: En. Sec. 1, Ch. 95, L. 1933.

Collateral References
Navigable Waters© 1 (2).
65 C.J.S. Navigable Waters § 7.

26-337. (3717.2) Navigable streams. All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States, and all rivers and streams which are navigable in fact are hereby declared navigable.

History: En. Sec. 2, Ch. 95, L. 1933.

26-338. (3717.3) Navigable and public waters open to fishing. Navigable rivers, sloughs or streams between the lines of ordinary high water thereof, of the state of Montana, and all rivers, sloughs and streams flowing through any public lands of the state, shall hereafter be public waters for the purpose of angling, and any rights of title to such streams, or the land between the high water flowlines or within the meander lines of navigable streams, shall be subject to the right of any person owning an angler's license of this state who desires to angle therein or along their banks to go upon the same for such purpose.

History: En. Sec. 3, Ch. 95, L. 1933.

Collateral References Fish €=>3. 36A C.J.S. Fish §§ 6-8. 26-339. (3718) Dumping refuse from sawmill into streams. No person, firm, or corporation operating a sawmill on or near any stream, pond, lake or river, or any person, firm or corporation purchasing from or acting for, with or on behalf of said sawmill operator, shall hereafter dump, drop, cart or deposit, or cause to be dumped, dropped, carted, or deposited, sawdust, bark, shavings, ashes, einders or other sawmill waste in or near any such stream, pond, lake or river, in such manner or place as will likely result or cause the same to be carried into the waters of any such stream, pond, lake or river; and any person so doing shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished as provided by section 26-324.

History: En. Sec. 28, Ch. 173, L. 1917; re-en. Sec. 3718, R. C. M. 1921; amd. Sec. 12, Ch. 224, L. 1947; amd. Sec. 1, Ch. 86, L. 1955.

Collateral References

Waters and Water Courses 68. 93 C.J.S. Waters § 48.

Pollution of oyster beds. 3 ALR 762. Pollution of stream by mining operations. 39 ALR 891.

26-340. (3719) Repealed—Chapter 159, Laws of 1955.

Repeal

This section (Sec. 34, Ch. 173, L. 1917; Sec. 13, Ch. 224, L. 1947), relating to the killing of moose, bison, buffalo, caribou or antelope, was repealed by Sec. 2, Ch. 159, Laws 1955.

26-341, 26-342. (3721.1, 3721.2) Repealed—Chapter 158, Laws of 1955.

Renes

These sections (Secs. 1, 2, Ch. 115, L. 1931; Sec. 14, Ch. 224, L. 1947; Secs. 1, 2, Ch. 86, L. 1951), relating to the killing

of game for head, hide, antlers, tusks, or teeth, and the failure to dress game as prima facie evidence of violation, were repealed by Sec. 3, Ch. 158, Laws 1955.

26-343. (3721.3) Repealed—Chapter 159, Laws of 1955.

Repeal

This section (Sec. 3, Ch. 115, L. 1931), containing a penalty provision, was re-

pealed by Sec. 2, Ch. 159, Laws 1955. For new general penalty provision, see sec. 26-324.

26-344. (3694.3) Restrictions on use of fish as bait—commission must authorize introduction of fish or game. The state fish and game commission shall have authority to prohibit the use of small fish as bait for catching fish in such waters as the commission shall designate. It shall have the power to promulgate such other regulations as are necessary to insure an adequate supply of fish in said waters, including the power to regulate fishing from boats or other floating devices and to regulate the use of fishing lures and/or baits in all waters of the state.

It shall be unlawful for any person or persons to transplant or introduce any fish or fish eggs into any body of water in the state, and it shall be unlawful for any person or persons to transplant or introduce any species of game birds or game animals into the state of Montana without first having obtained authorization from the fish and game commission.

Any person found guilty of a violation of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished as provided for in section 26-324.

History: Sec. 3694.3, R. C. M. 1935 as added Sec. 1, Ch. 100, L. 1949; amd. Sec. 1, Ch. 153, L. 1951.

Collateral References Fish \$\infty\$=8, 13 (1). 36A C.J.S. Fish \\$\\$ 26, 28.

CHAPTER 4

BEAVER-TRAPPING-LICENSE-PROTECTION

Section 26-401. Protection of beaver—permits and fee—tagging, importing and exporting of skins—expiration of permit—penalty for violation.

26-402. Destruction of beaver for protection of public health.

26-401. (3722) Protection of beaver—permits and fee—tagging, importing and exporting of skins—expiration of permit—penalty for violation. No person shall take, trap, shoot, kill, capture or attempt to take, trap, shoot, kill or capture, or in any way destroy any beaver in the state of Montana, or possess, buy, sell, ship or transport within or without the state, or cause the same to be done, any beaver or any part thereof including skins or hides and castors whether taken within or coming from without the state, except as hereinafter permitted.

Whenever beaver have increased in number to such an extent that in the judgment of the state fish and game commission the number of such beaver should be reduced, the commission shall have the authority to declare an open season on beaver under such rules and regulations as it shall prescribe; provided, however, that nothing herein contained shall authorize trapping on privately owned or leased lands, except with the approval of the landowner or lessee, or as hereinafter provided.

The state fish and game director may issue a permit to any bona fide owner or lessee of real estate which is being actually and materially damaged by beaver, to trap beaver on his own or leased premises only, and provided that the director shall, when issuing the permit mentioned, designate therein the maximum number of beaver that may be trapped under such permit. The fee for such permit shall be five dollars (\$5.00). All applications for beaver permits shall be filed with the state fish and game director, between the dates of May first and December thirty-first (31) of each year. The term "premises" shall be construed to include any irrigation ditch or right of way appurtenant to the land for which said license or permit is issued.

That the state fish and game director shall in person or, by warden, examine the premises and investigate the alleged damage by beaver before issuing a license or permit.

Any person trapping beaver under a license or permit of the state fish and game director shall properly care for all skins of beaver taken thereunder and as soon as cured shall send to the state fish and game warden an affidavit giving his name, residence, license or permit number, the date and place of capture, with the number so captured, together with fifty cents (50ϕ) for each skin, and if such officer is satisfied of the legal taking of the same, he shall thereupon attach metal numbered tags to each skin.

Any person who shall receive or bring into from without the state any beaver skin or skins shall report their arrival within thirty (30) days to the state fish and game director and furnish an affidavit a report setting forth the number of skins, the date of receipt, the name and address of the person from whom procured.

The state fish and game director shall keep a record of all skins so reported.

Each metal tag shall remain attached to the beaver skin to which it was originally affixed until it is dressed and manufactured into an article of commerce, or it shall accompany any skin shipped or transported out of the state. It shall be a misdemeanor, punishable as hereinafter provided, to remove a tag from such skins, to duplicate or reproduce such tags for fraudulent purposes or use contrary to the provisions of this act, or to misuse any tag detached from the skin to which it was originally attached.

Beaver skins taken within the state under permit, tagged as herein provided and beaver skins legally imported may be possessed, bought, sold or transported at any time within the state of Montana, but no beaver skin or skins may be exported in any manner from the state without the shipper first obtaining an export or shipping permit from the state fish and game director, which may be issued upon application showing the number of skins and the state or states from which they were trapped and the payment of a fee of sixty cents (60¢) for the permit for each shipment.

Any package offered for transportation from the state which contains a beaver skin or skins shall be clearly marked on the outside thereof with the names and addresses of the consignor and consignee, the number and kind of skins contained therein, and the number of the shipping permit.

Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished as provided by section 26-324.

Any beaver skin or skins taken or found in this state or which have been shipped out of this state except as specifically permitted by this section are being hereby declared contraband and shall be seized by the state fish and game director, warden or other officer authorized to enforce the provisions of this act. All skins so seized shall be marked or tagged for identification and sold by the state fish and game director at public auction in the state of Montana, after advertising at least fifteen (15) days prior to the date of sale, and the proceeds therefrom turned into the state treasury to be credited to the fish and game fund.

Beaver trapping permits issued under the provisions of this act shall expire June first of each year and all beaver skins taken thereunder and not reported and tagged according to the provisions of this section prior to July first following, shall be subject to seizure and sale as herein provided.

History: En. Sec. 38, Ch. 173, L. 1917; amd. Sec. 1, Ch. 197, L. 1919; re-en. Sec. 3722, R. C. M. 1921; amd. Sec. 17, Ch. 77, L. 1923; amd. Sec. 19, Ch. 59, L. 1927; amd. Sec. 1, Ch. 167, L. 1935; amd. Sec. 15, Ch. 224, L. 1947; amd. Sec. 1, Ch.

153, L. 1953; amd. Sec. 1, Ch. 24, L. 1957; amd. Sec. 1, Ch. 35, L. 1967.

Collateral References Game©=5, 7. 38 C.J.S. Game §§ 10, 15.

DECISIONS UNDER FORMER LAW

Beaver Pelts-Private Ownership

Under this section, prior to 1923 amendment, prohibiting the killing of beaver except as therein provided, and section 26-503, making possession of certain wild animals or parts thereof prima facie evidence that the possessor killed the same,

private ownership of beaver pelts is not a matter of common right, but may be acquired only by compliance with the restrictions, and then such ownership is qualified. Rosenfeld v. Jakways, 67 M 558, 563, 216 P 776.

26-402 (3722A) Destruction of beaver for protection of public health. Whenever complaint is made to the state board of health that beaver

are obstructing the free flow of a stream flowing through a settled area and into which sewage of a town or city is dumped, and the obstruction is such as to endanger public health the state board of health shall immediately investigate the facts regarding such complaint and if it finds that the work of the beavers endangers public health, it shall report the facts to the fish and game commission.

It shall thereupon be the duty of the fish and game commission to immediately issue a permit, free of charge, to the landowner upon whose land the beaver dams are located for the removal of the beaver, the number of which shall be designated by the deputy game warden [state fish and game warden] making the inspection. The landowner shall remove all beaver as provided by the permit within ten days after its issuance and shall also within that period remove the dams. Should the landowner refuse to remove the beaver or the dams in the ten-day period, or if he does not desire to do so and so advises the fish and game commission, then the fish and game commission is hereby authorized to remove such beaver by trapping or transplanting and to remove their dam by blasting or other

The fish and game commission shall furnish all labor needed to blast out or otherwise remove any such beaver dams. Necessary explosives in such operations shall be furnished by the county in which the beaver dams are located.

History: En. Sec. 1, Ch. 173, L. 1943. Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

CHAPTER 5

PROTECTION OF CERTAIN WILD BIRDS—SALE OF CONFISCATED BIRDS AND ANIMALS

Section 26-501. Protection of wild birds other than game birds.

26-502. Destruction of nests or eggs of birds or wild fowl.

26-503. Possession of unlawfully killed animals and of unlawful fishing imple-

ments-prima facie evidence-penalty.

26-504. Use of anchored snare unlawful.

26-505. Repealed.
26-506. Sale of confiscated birds and animals.
26-507. Certificate of sale.
26-508. Disposition of proceeds of sale. 26-509. Record of confiscated property.

26-510. Special wild turkey tags-fee.

26-511. Tagging of turkey. 26-512. Penalty for violation.

26-501. (3723) Protection of wild birds other than game birds. person who at any time shall hunt, capture, kill, possess, purchase, offer or expose for sale, ship, transport or cause to be shipped or transported any wild bird other than a game bird, or any part of the plumage, skin or body of any such bird, irrespective of whether said bird was captured or killed within or without the state, or take or destroy the nest or eggs of any such wild bird, except under a certificate or permit issued by the state fish and game warden [director], shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as provided by section 26-324. The provisions of this section shall not apply to the hunting, trapping, or killing of English sparrows, crows, eagles, hawks, snow owls, great gray owls, great horned owls, blackbirds, kingfishers, magpies and jays and such other birds as the fish and game commission shall designate, or the taking or destruction of their nests and eggs.

History: En. Sec. 41, Ch. 173, L. 1917; re-en. Sec. 3723, R. C. M. 1921; amd. Sec. 18, Ch. 77, L. 1923; amd. Sec. 20, Ch. 59 L. 1927; amd. Sec. 16, Ch. 224, L. 1947.

Compiler's Note

The bracketed word was inserted by the

compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

26-502. (3724) Destruction of nests or eggs of birds or wild fowl. Any person who shall willfully destroy the nests, or carry away the eggs from the nests of any of the birds or wild fowls mentioned in this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided by section 26-324.

History: En. Sec. 42, Ch. 173, L. 1917; re-en. Sec. 3724, R. C. M. 1921; amd. Sec. 17, Ch. 224, L. 1947.

26-503. (3725) Possession of unlawfully killed animals and of unlawful fishing implements—prima facie evidence—penalty. The possession of dead bodies, or any part thereof, of any of the game fish, game or nongame birds, game or fur-bearing animals defined by the fish and game laws of the state of Montana shall be prima facie evidence that such person or persons in whose possession the same are found have killed, caught or taken the same, and the possession of a fishing rod and line, spear, gig or barbed fork, on the banks or shores of a stream or lake shall be prima facie evidence that the person or persons in whose possession the same are found was using the same to fish.

Any person who shall possess, have or hold, or purchase, or keep in storage, or possess for any other purpose, any game fish, game bird, nongame bird, game animal, fur-bearing animal, or parts thereof, which shall have been unlawfully killed, captured, or taken, or who shall unlawfully use any fishing rod and line, or fishing lines, spear, gig or barbed fork, shall be guilty of a misdemeanor and punished as provided by section 26-324.

History: En. Sec. 43, Ch. 173, L. 1917; re-en. Sec. 3725, R. C. M. 1921; amd. Sec. 26, Ch. 192, L. 1925; amd. Sec. 21, Ch. 59, L. 1927; amd. Sec. 1, Ch. 41, L. 1931; amd. Sec. 18, Ch. 224, L. 1947.

Unlawful Possession

Section 26-110 has reference only to what the legislature denounced as unlawful possession under this section, and for which the accused could be prosecuted for unlawful possession. Shipman v. Todd, 131 M 365, 310 P 2d 300, 302.

References

Rosenfeld v. Jakways, 67 M 558, 564, 216 P 776.

Collateral References

Fish = 15; Game = 7, 9. 36A C.J.S. Fish § 43; 38 C.J.S. Game §§ 10, 18.

Constitutionality of statutes making one fact presumptive or prima facie evidence of another. 51 ALR 1139; 86 ALR 179 and 162 ALR 495.

Construction and application of statute making possession of carcass of game, fish or bird, or parts thereof, a criminal offense. 125 ALR 1200.

Right to kill game in defense of person or property. 93 ALR 2d 1366.

26-504. (3725.1) Use of anchored snare unlawful. It shall be unlawful for any person to use, or attempt to use, any anchored snare trap for the purpose of snaring any animal or bird.

History: En. Sec. 1, Ch. 23, L. 1933.

26-505. (3725.2) Repealed—Chapter 159, Laws of 1955.

Repeal

This section (Sec. 2, Ch. 23, L. 1933), relating to a penalty provision, was re-

pealed by Sec. 2, Ch. 159, Laws 1955. For new general penalty provision, see section 26-324.

26-506. (3726) Sale of confiscated birds and animals. All birds, animals, fish, heads, hides, teeth, or other parts of any animal seized by any officer as herein provided, shall be sold, under the direction of the state game warden [director] or his deputies [wardens], at a time, place, and manner so as to receive the highest price therefor. Such sales shall be made at public auction to the highest and best bidder, and the game warden [director] or his deputies [wardens] shall give notice of the time and place of such sale, together with a description of the bird, or birds, fish, animal or animals, or parts or portions of animals to be so sold by one publication, at least, in a newspaper of general circulation published in the county where such sale is noticed to be held, and the date of sale shall not be less than five nor more than thirty days after the last date of such publication; provided, that in cases where the property seized is perishable, the same may be sold by such officers without publishing a notice thereof, upon such public notice, and under such terms and conditions as, in the discretion of the officers, may seem conducive to secure the full value there-

History: En. Sec. 47, Ch. 173, L. 1917; re-en. Sec. 3726, R. C. M. 1921.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

References

Rosenfeld v. Jakways, 67 M 558, 564, 216 P 776; Shipman v. Todd, 131 M 365, 310 P 2d 300, 303 (Dissenting opinion).

Collateral References

Fish \$\infty\$=16; Game \$\infty\$=10. 36A C.J.S. Fish § 42; 38 C.J.S. Game § 17.

26-507. (3727) Certificate of sale. Upon the sale of such property, the officer shall issue a certificate to the party purchasing the same, certifying that the purchaser has the legal right to be in possession of the same, and anyone so acquiring said property from the state shall have the right to deal therewith without further question with respect to violation of the law, anything herein to the contrary notwithstanding.

History: En. Sec. 48, Ch. 173, L. 1917; re-en. Sec. 3727, R. C. M. 1921; amd. Sec. 27, Ch. 192, L. 1925.

References

Rosenfeld v. Jakways, 67 M 558, 564, 216 P 776.

26-508. (3728) Disposition of proceeds of sale. The money obtained upon the sale of such property shall be paid over to the court before whom the person having the same in possession at the time of seizure is prosecuted, or in which prosecution is pending, and if the person charged with violation of the law is found guilty before said court of violation of the

fish and game laws of the state, the money received for the sale of said property shall be paid over to the state treasurer, and be deposited by him to the credit of the fish and game fund; but should it be found that the party from whom the same was taken was not guilty of any violation of the fish and game laws of this state, said money shall be paid to the party from whom said birds, animals, fish, or parts or portions thereof were taken. No officer shall be liable for any damage on account of any search, examination, seizure, or sale as herein provided. Where wild animals, game birds, or fish are seized as in this act provided, and the person or persons who killed or captured the same cannot be ascertained, then the money so received from the sale of such animals, game birds, or fish shall be paid direct to the state treasurer. The cost of advertising notice of sale, as herein required, shall be paid from the fish and game fund.

History: En. Sec. 49, Ch. 173, L. 1917; re-en. Sec. 3728, R. C. M. 1921.

Liability of Game Warden for Seizure of Carcass

This section has reference only to a case wherein the officer has a right to seize

the property, and it offered no defense to a game warden who confiscated the carcass of a deer which was properly killed in open territory by one with a license. Shipman v. Todd, 131 M 365, 310 P 2d 300, 302.

26-509. (3729) Record of confiscated property. It shall be and is hereby made the duty of the state game warden [director], and of every deputy game warden [state fish and game warden], to make a full and complete record of all property by them, or either of them, confiscated because of a violation of the game and fish laws of this state, showing in detail a description of the property, the person from whom it was confiscated, the price received therefor upon public sale, and the disposition of the money. The state game warden [director] shall keep in his office a permanent record showing all property confiscated by him or any of his deputies [wardens], and the disposition made thereof under the provisions of this act.

History: En. Sec. 50, Ch. 173, L. 1917; re-en. Sec. 3729, R. C. M. 1921.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1

and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

26-510. Special wild turkey tags—fee. The state fish and game commission may issue wild turkey tags to the holder of a valid Class A-1, Class B-1, or Class B-2 license. Each tag shall authorize the holder to hunt, shoot, capture or possess one (1) wild turkey during such times and such places as the commission shall authorize an open season on wild turkey.

The fee for a wild turkey tag shall be two dollars (\$2.00). Turkey tags shall be issued either by a drawing system, or in unlimited number according to such rules and regulations as the commission shall prescribe.

History: En. Sec. 1, Ch. 35, L. 1959; amd. Sec. 3, Ch. 148, L. 1963.

26-511. Tagging of turkey. Every person who shall take or kill any turkey shall immediately thereafter attach to the leg of said turkey the

proper tag which has been validated by the holder thereof by complying with instructions on said tag.

History: En. Sec. 2, Ch. 35, L. 1959.

26-512. Penalty for violation. Any person who shall kill, capture or possess any wild turkey by authority of any turkey tag or permit and shall fail or neglect to attach his tag to the turkey, or shall fail to validate his tag by filling out or punch marking the tag as required and to keep the tag attached while the same is possessed by him, shall be guilty of a misdemeanor and upon conviction shall be punished as provided for in section 26-324.

History: En. Sec. 3, Ch. 35, L. 1959.

CHAPTER 6

POWER OF COMMISSION TO DISPOSE OF GAME ANIMALS DAMAGING PROPERTY AND OVERSUPPLY OF FISH IN LAKE COUNTY

(Repealed—Section 8, Chapter 20, Laws of 1953; Section 2, Chapter 157, Laws of 1955; Section 1, Chapter 185, Laws of 1955)

26-601 to 26-612. (3729.1 to 3729.3(A)) Repealed.

Repeal

These sections (Secs. 1 to 3, Ch. 72, L. 1933; Sec. 1, Ch. 152, L. 1943; Sec. 1, Ch. 145, L. 1945; Sec. 1, Ch. 146, L. 1945; Sec. 1, Ch. 57, L. 1947; Sec. 1, Ch. 136, L. 1947; Secs. 1 to 7, Ch. 20, L. 1953), relating to

disposal of increased numbers of fish and game animals damaging property by fish and game commission, were repealed by Sec. 8, Ch. 20, Laws 1953; Sec. 2, Ch. 157, Laws 1955; Sec. 1, Ch. 185, Laws 1955.

CHAPTER 7

SHIPMENT OF ANIMALS FROM STATE

Section 26-701. Removal of animals or parts of animals from the state unlawful, when illegally taken.

26-702. Repealed. 26-703. Repealed.

26-704. Labeling of packages for shipment from state.

26-705. Violations of provisions relating to shipment—penalty—confiscation.

26-706. Repealed. 26-707. Repealed.

26-708. Commerical exportation of aquatic insects prohibited.

26-701. (3730) Removal of animals or parts of animals from the state unlawful, when illegally taken. It is hereby declared to be unlawful and a misdemeanor, punishable as provided by section 26-324, for any person or persons, to possess, ship or take out of the state any illegally taken game and nongame birds, fish, game animals, fur-bearing animals or the skins of fur-bearing animals, or any parts thereof, whether taken within or coming from without the state.

History: En. Sec. 51, Ch. 173, L. 1917; re-en. Sec. 3730, R. C. M. 1921; amd. Sec. 19, Ch. 77, L. 1923; amd. Sec. 22, Ch. 59, L. 1927; amd. Sec. 19, Ch. 224, L. 1947; amd. Sec. 1, Ch. 38, L. 1963.

Collateral References Fish \$\infty\$5; Game \$\infty\$7. 38 C.J.S. Game § 16. 24 Am. Jur. 389, Game and Game Laws, §§ 24, 25.

Statutes or regulations regarding possession, transportation, or sale within state of fish or game taken outside of state as interference with foreign or interstate commerce. 92 ALR 1266.

Validity, construction, and application of statutes and other regulations relating to transportation or disposal of carcasses

of dead animals not slaughtered for food. 121 ALR 732.

26-702, 26-703. (3731, 3732) Repealed—Chapter 38, Laws of 1963.

Repeal

These sections (Secs. 52, 53, Ch. 173, L. 1917; Secs. 20, 21, Ch. 77, L. 1923; Secs. 23, 24, Ch. 59, L. 1927; Sec. 1, Ch. 226, L. 1943; Sec. 1, Ch. 102, L. 1945;

Sec. 1, Ch. 182, L. 1947; Sec. 1, Ch. 116, L. 1955), relating to permits for removal from the state of game animals, birds, and fish, were repealed by Sec. 2, Ch. 38, Laws 1963.

26-704. (3733) Labeling of packages for shipment from state. All shippers of fish, game or nongame birds, game animals, fur-bearing animals, or the skins of fur-bearing animals or predatory animals, or parts thereof are hereby required to label all packages offered for shipment by parcel post, common carrier or otherwise, such label to be securely attached to the address of the package and plainly indicate the names and addresses of the consignor and consignee and the complete contents of said package. All persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished in the manner provided by section 26-324.

History: En. Sec. 54, Ch. 173, L. 1917; re-en. Sec. 3733, R. C. M. 1921; amd. Sec. 22, Ch. 77, L. 1923; amd. Sec. 28, Ch. 192, L. 1925; amd. Sec. 25, Ch. 59, L. 1927; amd. Sec. 20, Ch. 224, L. 1947.

Collateral References Fish ≈13 (1); Game ≈7. 36A C.J.S. Fish § 28; Game § 13.

26-705. (3734) Violations of provisions relating to shipment—penalty—confiscation. No person or persons, or the agent or employee of any common carrier, association, stage, express, railway or transportation company, shall transport or receive for transportation or carriage or sell or offer for sale any of the game animals, game or nongame birds, fish, furbearing animals, or the skins of fur-bearing animals, or parts thereof, except as specifically provided for by this act, and all game or nongame birds, fish, game animals, or fur-bearing animals, or parts thereof, had in possession, or which have been shipped or are being transported in violation of any of the provisions of this act, shall be seized, confiscated, and disposed of as provided by law. Any person violating any of the provisions of this act shall be guilty of a misdemeanor and punished in the manner provided by section 26-324.

History: En. Sec. 55, Ch. 173, L. 1917; re-en. Sec. 3734, R. C. M. 1921; amd. Sec. 26, Ch. 59, L. 1927; amd. Sec. 21, Ch. 224, L. 1947.

Collateral References Fish@16; Game@10. 36A C.J.S. Fish § 42; 38 C.J.S. Game § 17.

26-706. (3735) Repealed—Chapter 146, Laws of 1955.

Repeal
This section (Sec. 56, Ch. 173, L. 1917;
Sec. 29, Ch. 192, L. 1925; Sec. 22, Ch.

224, L. 1947), relating to transporting or selling illegally taken fish, was repealed by Sec. 2, Ch. 146, Laws 1955.

26-707. (3736) Repealed—Chapter 38, Laws of 1963.

Repeal
This section (Sec. 57, Ch. 173, L. 1917;
Sec. 27, Ch. 59, L. 1927; Sec. 1, Ch. 171,

L. 1943), relating to the fee for shipping permits, was repealed by Sec. 2, Ch. 38, Laws 1963.

26-708. Commercial exportation of aquatic insects prohibited. It is hereby declared to be unlawful and a misdemeanor, punished as provided by section 26-324, for any person or persons, to ship or take out of the state any aquatic insects for speculative purposes, for market or for sale. This section shall not apply to aquatic insects caught in private ponds by the owners thereof.

History: En. Sec. 1, Ch. 13, L. 1965.

CHAPTER 8

MISCELLANEOUS PROHIBITIONS

Section 26-801. Lawful for merchants, hotels or restaurants to possess and sell game not killed within state.

Evidence of lawful possession of game must be produced, when.

Record to be kept by persons having in possession or offering game 26-802. 26-803.

26-804. Noncompliance with law a misdemeanor.

26-805. Definitions.

26-806. Unlawful to buy, sell, possess or transport fish, game birds, game animals, or fur-bearing animals, or parts thereof-exceptions-penalty.

26-807. Repealed.

26-808. Meaning of word "sale" in game and fish laws.

26-809. Bag limit prizes for game or fish taken unlawful—exception. 26-810. Repealed.

26-811. Contests based on size of game animals unlawful.

(3737) Lawful for merchants, hotels or restaurants to possess and sell game not killed within state. It shall be lawful for any merchant, hotel, or restaurant keeper to have in his possession, and to offer for sale, and to sell game and game birds; provided, that said game and game birds are not and have not been killed within the state of Montana.

History: En. Sec. 58, Ch. 173, L. 1917; re-en. Sec. 3737, R. C. M. 1921.

26-802. (3738) Evidence of lawful possession of game must be produced, when. It shall be the duty of every merchant, hotel, and restaurant keeper, having in his possession and offering for sale any game or game birds, to produce upon demand, for the inspection of any game warden or deputy game warden or sheriff, the receipt or record and shipping and transportation receipts required hereby to be kept by him, and a failure or refusal to produce the same upon demand, coupled with the possession and offering for sale of game or game birds, shall constitute prima facie evidence of the violation of this act.

History: En. Sec. 59, Ch. 173, L. 1917; re-en. Sec. 3738, R. C. M. 1921.

(3739) Record to be kept by persons having in possession or offering game for sale. It shall be the duty of every person having in his possession and offering for sale any game or game birds to keep a record showing the amount and kind of game and game birds received by him. together with shipping and transportation receipts showing the true time and place of shipment of said game and game birds, and the name of the person shipping same; provided, however, that any merchant in Montana selling game or game birds to any hotel or restaurant keeper or other person shall, in addition to the record and receipts heretofore required to be kept by him, keep a record of the date of sale, kind, and amount of game or game birds, and the name of the purchaser; and provided, further, that in the case of hotel and restaurant keepers, or other persons buying game or game birds from a merchant within the state of Montana, a receipt from the said merchant showing the date, amount, and kind of game or game birds purchased shall be sufficient evidence of compliance with the provisions of this act by such hotel or restaurant keeper or other person.

History: En. Sec. 60, Ch. 173, L. 1917; re-en. Sec. 3739, R. C. M. 1921.

26-804. (3740) Noncompliance with law a misdemeanor. Any person who shall have in his possession, and offer for sale, or sell any game or game birds without having complied with the provisions of this act relating to the keeping of a record and shipping and transportation receipts, shall be guilty of a misdemeanor and punished in the manner provided by section 26-324.

History: En. Sec. 61, Ch. 173, L. 1917; re-en. Sec. 3740, R. C. M. 1921; amd. Sec. 23, Ch. 224, L. 1947.

26-805. (3741) **Definitions.** In the construction of this act the words "game" and "game birds" or parts of the same, shall be construed to mean the game animals and game birds, the killing of which is restricted or forbidden by the laws of Montana; and the words "merchant," "hotel and restaurant keeper," shall include each and every manager, servant, agent, and employer of such person.

History: En. Sec. 62, Ch. 173, L. 1917; re-en. Sec. 3741, R. C. M. 1921; amd. Sec. 30, Ch. 192, L. 1925.

Collateral References Game©=2, 4. 38 C.J.S. Game §§ 1, 8.

26-806. (3742) Unlawful to buy, sell, possess or transport fish, game birds, game animals, or fur-bearing animals, or parts thereof—exceptions—penalty. It is hereby made unlawful for any person to purchase, sell offer to sell, possess, ship, or transport any game fish, game bird, migratory game bird, game animal or fur-bearing animal or part thereof, protected by the laws of this state, whether belonging to the same or different species from that native to the state of Montana, except as specifically permitted by the laws of this state. The provisions of this section shall not prohibit the possession or transportation within the state of any legally taken fish, game bird, migratory game bird, game animal or fur-bearing animal, or part thereof, nor the sale, purchase, or transportation of hides, heads or mounts of lawfully killed game animals, game birds, game fish or fur-bearing animals. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished as provided by law.

History: En. Sec. 63, Ch. 173, L. 1917; amd. Sec. 1, Ch. 142, L. 1919; re-en. Sec. 3742, R. C. M. 1921; amd. Sec. 23, Ch. 77, L. 1923; amd. Sec. 28, Ch. 59, L. 1927; amd. Sec. 1, Ch. 115, L. 1939; amd. Sec. 2, Ch. 22, L. 1941; amd. Sec. 24, Ch. 224, L. 1947; amd. Sec. 1, Ch. 146, L. 1955.

26-807. (3742.1) Repealed—Chapter 159, Laws of 1955.

Repeal

pealed by Sec. 2, Ch. 159, Laws 1955. For This section (Sec. 29, Ch. 59, L. 1927). new general penalty provision, see secrelating to a penalty provision, was retion 26-324.

- 26-808. (3743) Meaning of word "sale" in game and fish laws. The word "sale," as used in the statute laws of this state touching the sale of game and fish, the sale of which is prohibited by law, does and shall be considered to mean:
- A contract by which, for a pecuniary consideration called a price, one transfers an interest in either game or fish.
- A contract by which, for an article or thing of value, one transfers, barters, or exchanges an interest either in game or fish.

History: En. Sec. 64, Ch. 173, L. 1917; re-en. Sec. 3743, R. C. M. 1921.

Collateral References Fish = 13 (1); Game = 7. 36A C.J.S. Fish § 28; 38 C.J.S. Game 8 10.

26-809. (3744.1) Bag limit prizes for game or fish taken unlawful exception. That it shall be unlawful for any person, firm, corporation, association or club to offer or give any prize, gift or anything of value in connection with, or as a bag limit prize for, the taking, capturing, killing or in any manner acquiring any game, fish, fowl, fur-bearing animals, or any fish, bird or animal now, or that shall be hereafter, protected in any way by the fish and game laws of the state of Montana.

This act shall not be construed to prohibit the award of prizes for any one game bird, animal, fish or fur-bearing animal on the basis of size, quality, or rarity.

History: En. Sec. 1, Ch. 82, L. 1935.

26-810. (3744.2) Repealed—Chapter 159, Laws of 1955.

section 26-809, was repealed by Sec. 2, Ch. 159, Laws 1955. For new general pen-This section (Sec. 2, Ch. 82, L. 1935), relating to a penalty for the violation of alty provision, see section 26-324.

26-811. Contests based on size of game animals unlawful. Except as provided in this section, it is unlawful for any person, as defined in section 26-201, to conduct or sponsor in any manner a contest in which a prize is offered to a person who kills a game animal possessing the largest antlers or horns, carrying the greatest weight, having the longest body, or any similar contest based upon the size or weight of a game animal or part of a game animal. This act does not apply to recognition given by the nationally established and recognized Boone and Crockett trophy institute. A person who violates this section is guilty of a misdemeanor and is punishable according to the provisions of section 26-324.

History: En. Sec. 1, Ch. 133, L. 1961.

CHAPTER 9

OUTFITTER'S LICENSE—TAXIDERMIST'S LICENSE

Section 26-901. Outfitter's license—qualifications—bonds—acting as guide. Offenses-penalty-revocation of license.

26-903. Repealed.

26-904. Who deemed outfitter. 26-905. Record required to be kept by outfitter—contents—failure to comply

-revocation of license.

Outfitter and employees of outfitter equally responsible with others 26-906. for violations of law—must report violations.

26-907. Taxidermist's license—fee—penalty for violations.

26-901, (3745) Outfitter's license — qualifications — bonds — acting as guide. It shall be unlawful for any persons, company or corporation to engage in the business of outfitting without such person, persons, company or corporation having first obtained an outfitter's license from the state fish and game commission.

Each outfitter shall be a financially responsible citizen of the United States, a bona fide resident of the state of Montana, and possess proper equipment for the protection and convenience of his guests. Before issuing any outfitter's license, the director shall be satisfied that the applicant therefor shall possess the necessary ability, experience and equipment to fulfill the duties and responsibilities of an outfitter according to such standards that have been adopted by the commission. Any application for an outfitter's license made to the commission may be held for thirty (30) days for investigation. The director may refuse a license to any such applicant who does not qualify under the standards adopted by the commission, however, applicant may appeal to the commission within twenty (20) days of the date of the refusal and the commission shall hold a hearing on such appeal and the decision of the commission shall be final on said application. Before issuance of a license to any outfitter, the applicant therefor shall file a written application with the director of state fish and game department and said application shall be signed and sworn to by the applicant, stating in detail the name, address, and the property owned and used in said business by such applicant, whether he intends to outfit for hunting or fishing parties or both, his citizenship and such other facts as may be required to fully inform the director of the ability of the applicant to comply with this act, and the rules and regulations of the state fish and game commission.

An applicant for an outfitter's license shall file in the office of the state fish and game commission a corporate surety bond executed to the state of Montana in the penal sum of one thousand dollars (\$1,000.00) conditioned upon the faithful performance on the part of the outfitter, his agents or employees, and in compliance with the provisions of the laws of the state of Montana and the rules and regulations of the commission. The fee for an outfitter's license shall be ten dollars (\$10.00) and shall expire annually on January 1. This license shall authorize an outfitter to act as a guide for any person or party engaging him as an outfitter. The residential requirements herein provided for procuring an outfitter's license are hereby waived for the citizens of any state or states to the same extent that the home state of the applicant waives such residential requirements of the citizens of the state of Montana, providing that such waiver shall extend only to counties bordering on a state adjacent to the state of Montana. No outfitter is authorized to shoot or attempt to shoot or kill or take fish or game for those engaging him as an outfitter.

History: En. Sec. 66, Ch. 173, L. 1917; re-en. Sec. 3745, R. C. M. 1921; amd. Sec. 17½, Ch. 77, L. 1923; amd. Sec. 1, Ch. 103, L. 1941; amd. Sec. 1, Ch. 173, L. 1949; amd. Sec. 1, Ch. 184, L. 1951; amd. Sec. 1, Ch. 223, L. 1955.

Collateral References
Licenses 11 (1), 20, 29,
53 C.J.S. Licenses §§ 30, 33, 48.

(3746) Offenses—penalty—revocation of license. son who shall act as an outfitter without having an outfitter's license as the term "outfitter" is commonly understood, or any outfitter who shall willfully fail to report any violation committed by any person or persons employing him as an outfitter, or any employee who shall willfully fail to report any violation committed by any person or persons whom he is accompanying as a guide, or who shall be found guilty of a violation of the state fish and game laws, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as provided by law, and in addition, when any outfitter or agent or employee shall be found guilty of a violation of the fish and game laws, or rules and regulations of the commission, or who shall advertise himself to be an outfitter and shall willfully misrepresent his facilities, services, or equipment used, shall have his license revoked upon conviction of willful misrepresentation, and said license heretofore issued shall be revoked at the discretion of the director, with the approval of the commission, for a period of not less than two (2) years, nor more than five (5) years.

History: En. Sec. 67, Ch. 173, L. 1917; re-en. Sec. 3746, R. C. M. 1921; amd. Sec. 25, Ch. 224, L. 1947; amd. Sec. 2, Ch. 173, L. 1949; amd. Sec. 2, Ch. 184, L. 1951; amd. Sec. 5, Ch. 223, L. 1955.

Collateral References Licenses \$\infty 40. 53 C.J.S. Licenses \\$ 66.

26-903. (3747) Repealed—Chapter 184, Laws of 1951.

Repeal

This section (Sec. 68, Ch. 173, L. 1917; Sec. 3, Ch. 173, L. 1949), defining the

term "guide," was repealed by Sec. 6, Ch. 184, Laws 1951.

26-904. (3748) Who deemed outfitter. For the purpose of this act, the word "outfitter" shall mean any person or persons, company or corporation who shall engage in the business of outfitting for hunting or fishing parties, as the term is commonly understood, who shall for consideration provide any saddle or pack animal or animals or personal service for hunting or fishing parties, camping equipment, vehicles or other conveyance except boats for any person or persons to hunt, trap, capture, take or kill any game, or who shall for consideration furnish a boat or other floating craft and accompany any person or persons for the purpose of catching fish, or who shall aid or assist any person or persons in locating or pursuing any game animal.

History: En. Sec. 69, Ch. 173, L. 1917; 4, Ch. 173, L. 1949; amd. Sec. 3, Ch. 184, re-en. Sec. 3748, R. C. M. 1921; amd. Sec. L. 1951; amd. Sec. 2, Ch. 223, L. 1955.

26-905. (3749) Record required to be kept by outfitter—contents—failure to comply—revocation of license. Whenever an outfitter is engaged by any person or party, such outfitter shall keep a record showing the name, address, license number, dates employed by each person or party and the numbers and kind of game killed or amount of fish taken. Such information

contained in the record shall be kept available for the period of one (1) year. Failure on the part of any outfitter to comply with the provisions of this act shall be sufficient cause for revocation of an outfitter's license by the commission.

History: En. Sec. 70, Ch. 173, L. 1917; re-en. Sec. 3749, R. C. M. 1921; amd. Sec. 5, Ch. 173, L. 1949; amd. Sec. 4, Ch. 184, L. 1951; amd. Sec. 4, Ch. 223, L. 1955.

26-906. (3750) Outfitter and employees of outfitter equally responsible with others for violations of law-must report violations. Any person accompanying a hunting or fishing party as an outfitter or agent or employee of such outfitter shall be equally responsible with any person or party employing him as an outfitter for any violation of the law; any such outfitter or employee of such outfitter, who shall willfully fail to or refuse to report any violation of the law, shall be liable to the penalties as herein provided.

History: En. Sec. 71, Ch. 173, L. 1917; re-en. Sec. 3750, R. C. M. 1921; amd. Sec. 6, Ch. 173, L. 1949; amd. Sec. 5, Ch. 184, L. 1951; amd. Sec. 3, Ch. 223, L. 1955.

26-907. (3751) Taxidermist's license — fee — penalty for violations. Any person who shall engage in, or who is at the present time engaged in conducting any taxidermist business, as the term is generally understood, or any person who conducts a business for the purpose of mounting, preserving or preparing any of the dead bodies of any birds, or animals, or any part thereof, mentioned in the game laws of this state, must first obtain from the state fish and game director a taxidermist's license and shall pay an annual license fee of fifteen dollars (\$15.00) therefor. Such person shall, keep a written record of all the articles of game, the kind and number of each, by whom owned, license number, and the residence of owner, also of all the articles of game shipped, and to whom and where shipped. The above record shall be kept for at least a period of one (1) year and open to inspection by any state game warden at any reasonable time. Any person violating the provisions hereof shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided by section 26-324. In all cases of conviction of violation of this act the license of the person convicted shall be revoked.

History: En. Sec. 72, Ch. 173, L. 1917; re-en. Sec. 3751, R. C. M. 1921; amd. Sec. 24, Ch. 77, L. 1923; amd. Sec. 26, Ch. 224, L. 1947; amd. Sec. 1, Ch. 12, L. 1959.

Cross-Reference

Carrying on business without license, penalty, sec. 94-1511.

Collateral References

Licenses = 11 (1), 25. 53 C.J.S. Licenses §§ 30, 35.

CHAPTER 10

DISPOSAL OF FINES-DUTIES OF COURTS-EXCEPTIONS FROM ACT

Section 26-1001. Disposition of fines, bond and penalties—serving out fines and costs 26-1002. Payment of cost bill to county wherein costs were incurred.

26-1003 to 26-1005. Repealed.

26-1006. Act not applicable to cases of extreme hunger.

26-1007. Use of silencers or mufflers on firearms.
26-1008. Permit for taking fish or game for scientific purposes.

26-1001. (3753) Disposition of fines, bond and penalties—serving out fines and costs. All fines, bonds, and penalties mentioned in any section of this act may be collected by civil action in the name of the state of Montana in any court of competent jurisdiction upon proper complaint being filed, and the amount of all fines and bonds collected under the provisions of this act shall be paid to the state game warden [director], and by him paid to the state treasurer and by him placed to the credit of the fund to be known as the fish and game fund. All such fines, bonds and costs shall be collected without stay of execution, and the defendant, or defendants, may by order of the court be confined in the county jail of the county until such fine and costs are served out at the rate of \$2.00 per day.

History: En. Sec. 74, Ch. 173, L. 1917; re-en. Sec. 3753, R. C. M. 1921; amd. Sec. 25, Ch. 77, L. 1923.

Compiler's Note

The bracketed word was inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game

director and all deputy state fish and game wardens were designated as state fish and game wardens.

Collateral References

Fish \$\sim 14; Game \$\sim 8.\ 36A C.J.S. Fish \ 41; 38 C.J.S. Game \ 16.\ 24 Am. Jur. 392, Game and Game Laws, \ 27 et seq.

26-1002. (3754) Payment of cost bill to county wherein costs were incurred. In all cases where there is a prosecution for the violation of fish and game laws, and costs have been incurred therein, a cost bill shall be prepared, including the cost of board of prisoners, and presented to the state board of examiners, and if by them allowed, the state treasurer shall thereupon pay the same out of the state game and fish fund to the county treasurer of the county wherein such costs were incurred.

History: En. Sec. 75, Ch. 173, L. 1917; re-en. Sec. 3754, R. C. M. 1921.

Costs©=294. 20 C.J.S. Costs § 442.

26-1003 to 26-1005. (3755 to 3757) Repealed—Chapter 185, Laws of 1955.

Repeal

These sections (Secs. 76 to 78, Ch. 173, L. 1917), relating to the transportation of persons and property in furtherance of

fish and game interest, and the duties of grand juries, judges, prosecuting officials, and peace officers, were repealed by Sec. 1, Ch. 185, Laws 1955.

26-1006. (3758) Act not applicable to cases of extreme hunger. When it is shown that any violation of the provisions of this act was for the purpose of preventing great suffering by hunger of any person or persons, which could not otherwise have been avoided, the provisions of this act shall not apply to said case.

History: En. Sec. 79, Ch. 173, L. 1917; re-en. Sec. 3758, R. C. M. 1921.

References

State v. Rathbone, 110 M 225, 238, 100 P 2d 86.

Collateral References

Fish \$\infty\$=13 (1); Game \$\infty\$-7.

36A C.J.S. Fish § 28; 38 C.J.S. Game § 10.

26-1007. (3759) Use of silencers or mufflers on firearms. It shall be unlawful for any person to take into the fields or forests, or to have in his possession while out for the purpose of hunting any wild animals or birds,

any device or mechanism designed to silence or muffle, or minimize the report of any firearm, whether such device or mechanism be separated from or attached to any firearm.

History: En. Sec. 80, Ch. 173, L. 1917; re-en. Sec. 3759, R. C. M. 1921.

Collateral References Game©~7. 38 C.J.S. Game § 10.

26-1008. (3760) Permit for taking fish or game for scientific purposes. It shall hereafter be lawful for the duly accredited representative of any school, college, university or other institution of learning, who may be investigating a scientific subject making the same necessary, to take, kill, capture and have in his possession for such purpose, any of the birds, fish or animals found in this state, and to take, kill and capture the same in any way, except by the explosion of dynamite; provided, that no more of any such birds, fish or animals shall be taken than are necessary for such investigation, and provided also that any person who shall desire to engage in such scientific investigation shall apply to the state game warden [director] for a license so to do. If the state game warden [director] is satisfied of the good faith of the applicant, he shall issue to him a permit, which shall place a time limit upon such investigation, and shall place a restriction upon the number of birds, fish or animals to be taken thereunder; and the person to whom such license is issued shall pay therefor the sum of five dollars (\$5.00), and shall have no right or authority to take, have or capture any other or greater number of birds, fish or animals than are mentioned in said license. Any person violating the provisions of this section shall be guilty of a misdemeanor and punishable as provided by section

History: En. Sec. 81, Ch. 173, L. 1917; re-en. Sec. 3760, R. C. M. 1921; amd. Sec. 27, Ch. 224, L. 1947.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

Collateral References

Fish = 10 (1); Game = 5. 36A C.J.S. Fish § 36; 38 C.J.S. Game 3 15.

CHAPTER 11

GAME PRESERVES, MIGRATORY BIRD RESERVATIONS

Section 26-1101. Creation of game preserves—boundaries—provisions thereof—penalties for violation of the provisions of this act.

26-1102. Sun river preserve. 26-1103 to 26-1106. Repealed.

26-1107. Flathead lake bird preserve.

26-1108. Consent to acquisition of certain land by United States for migratory bird reservation.

26-1108.1. Consent to acquisition of certain land by United States for transportation of a supplemental water supply for the Benton Lake Wildlife Refuge.

26-1109. Regulation of bird reserve by commission.

26-1110 to 26-1115. Repealed.

26-1116. Teton-Spring Creek bird preserve.

26-1117 to 26-1119. Repealed.

26-1120. Fish and game commission to procure hunting rights on adjoining federal wildlife preserve—certain areas to be open to resident licensees.

- 26-1121. Payment for lands authorized.
- 26-1122. Assent to act of Congress known as Pittman-Robertson bill-reserva-
- 26-1123. Assent to act of Congress known as Pittman-Robertson bill—authority of fish and game commission.
- 26-1124. Co-operation with United States—power to acquire lands.
- 26-1125. Use of license fee.
- 26-1126. Consent to acquisition of certain land by United States for exhibition park for bison and other big game animals.
- 26-1127. Development by fish and wildlife service, United States department of the interior.

(3761) Creation of game preserves—boundaries—provisions 26-1101. thereof—penalties for violation of the provisions of this act. There are hereby created, for the better protection of all the game animals and birds within the limits thereof, game preserves within the state of Montana, and more particularly hereinafter described as to their exterior limits by sections 26-1102 to 26-1104, 26-1106, 26-1107, 26-1110, 26-1112, 26-1114, 26-1116, 26-1118; except as hereinafter provided no person shall, within the limits of any game preserve within the state of Montana whether such preserve is created by the legislature or by the fish and game commission, hunt for, trap, capture, kill, or take, or cause to be hunted for, trapped or killed, any game animals or fur-bearing animals or birds of any kind whatever within the limits of said preserve, or carry or discharge any firearms, or create any unusual disturbance tending to or which may frighten or drive away any of the game animals or birds therein, or chase the same with dogs or hounds in said preserve; provided that the commission may declare that any preserve shall be open to the trapping of fur-bearing animals during the regular open season.

Permits to capture animals or birds for the purpose of propagation or for scientific purposes or to trap fur-bearing animals or to destroy mountain lions, wolves, foxes, coyotes, wildcats, lynx, or other predatory animals or birds or for carrying firearms, may be issued by the state game warden [director], upon the payment of such fee and in accordance with such regulations as may be established for said preserve by the state fish and game commission. Any person violating any of the provisions of this section or any other law of Montana relating to game preserves, shall be guilty of a misdemeanor and shall be punishable as provided by section 26-324.

History: En. Sec. 83, Ch. 173, L. 1917; re-en. Sec. 3761, R. C. M. 1921; amd. Sec. 28, Ch. 224, L. 1947; amd. Sec. 1, Ch. 31, L. 1949.

Compiler's Notes

The bracketed word was inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

Sections 26-1103, 26-1104, 26-1106, 26-1110, 26-1112, and 26-1114, referred to in this section, were repealed by Sec. 1, Ch. 54, Laws 1957. Section 26-1118 was repealed by Sec. 1, Ch. 171, Laws 1951.

Collateral References

Game \$\sim 3\frac{1}{2}.
38 C.J.S. Game \ 7.
24 Am. Jur. 381, Game and Game Laws,
\ 10.

26-1102. (3763) Sun river preserve. Beginning at a point on the continental divide of the Rocky mountains, due south of the head or source of the south fork of the north fork of Sun river, in what will be section eight, township eighteen north of range ten west, Montana meridian, when

surveyed; thence due north from the crest of the continental divide to the head of the south fork of the north fork of Sun river; thence northerly along and down the course of the south fork of the north fork of Sun river, as it winds and turns to its confluence with the north fork of the north fork of Sun river; thence northerly along the course of the north fork of the north fork of Sun river, as it winds and turns to its head or source; thence due north to the crest of the continental divide of the Rocky mountains; thence along the crest of the continental divide of the Rocky mountains southwesterly and southerly to the place of beginning intending hereby to include in said game preserve all that territory lying between the said south fork of the north fork and the said north fork of the north fork of Sun river on the east, and the continental divide of the Rocky mountains on the west.

History: En. Sec. 1, Ch. 34, L. 1913; re-en. Sec. 83, Ch. 173, L. 1917; re-en. Sec. 3763, R. C. M. 1921.

26-1103, 26-1104. (3764, 3765) Repealed—Chapter 54, Laws of 1957.

Reneal

These sections (Sec. 1, Ch. 87, L. 1911; Sec. 1, Ch. 124, L. 1915; Sec. 83, Ch. 173, L. 1917; Sec. 1, Ch. 138, L. 1919; Sec. 1, Ch. 80, L. 1925; Sec. 1, Ch. 75, L. 1933; Sec. 29, Ch. 224, L. 1947), relating to the Gallatin and Snowy Mountain preserves, were repealed by Sec. 1, Ch. 54, Laws 1957.

26-1105. (3766) Repealed—Chapter 31, Laws of 1949.

Repeal

This section (Sec. 83, Ch. 173, L. 1917), prescribing the boundaries of Highwood

national forest, was repealed as Sec. 3766, Revised Codes 1935 by Sec. 2, Ch. 31, Laws 1949.

26-1106. (3767) Repealed—Chapter 54, Laws of 1957.

Repeal

This section (Sec. 83, Ch. 173, L. 1917; Sec. 1, Ch. 3, L. 1949), relating to the Powder river game preserve, was repealed by Sec. 1, Ch. 54, Laws 1957.

26-1107. (3768) Flathead lake bird preserve. That certain islands, two in number, including lot one of block one, containing two and fifty-seven hundredths acres; lot two of block one, containing two and sixty hundredths acres; lot one of block two, containing one and sixty-five hundredths acres, all being in the villa site of islands, situated in Flathead lake, in the county of Flathead, Montana, according to the official plat and survey of said land returned to the general land office by the surveyor general, be and the same are hereby made a perpetual place of refuge for birds of all kinds, the same to be called and known as "Flathead Lake Bird Preserve," which said lands shall be specially reserved for the breeding, propagating, and protection of all species of birds.

It shall be unlawful for any person to kill, shoot, capture, or destroy, or in any way injure any bird on said islands, or to interfere with their eggs or nests, or to shoot at, wound, or kill any bird within a distance of four hundred yards from the shore line of said islands.

It shall be unlawful for any person to kill, shoot, capture, or destroy, or in any way injure any bird or animal on the university of Montana biological reserve located on the east shore of Flathead lake, or to interfere with their eggs or their young, or their nests, or to shoot at, wound,

or kill any bird or any animal within four hundred yards of said university of Montana biological reserve, or to discharge any firearms on said reserve, or within four hundred yards thereof.

History: En. Sec. 83, Ch. 173, L. 1917; re-en. Sec. 3768, R. C. M. 1921.

26-1108. Consent to acquisition of certain land by United States for migratory bird reservation. Consent of the state of Montana is given to the acquisition by the United States by purchase, gift, devise, or lease of such areas of land or water, or of land and water, in sections 31 and 32 in township 28 north of range 22 west; sections 4, 5, 8, 9, 16, 17, 18, 19 and 20 in township 27 north, of range 22 west; sections 13, 14, 15, 16, 21, 22, 23 and 24 in township 27 north of range 23 west, in Flathead county, Montana, as the United States may deem necessary for the establishment of a migratory bird reservation in accordance with the act of Congress approved February 18, 1929, entitled: "An act to more effectively meet the obligations of the United States under the migratory bird treaty with Great Britain by lessening the dangers threatening migratory game birds from drainage and other causes by the acquisition of areas of land and of water to furnish in perpetuity reservations for the adequate protection of such birds; and authorizing appropriations for the establishment of such areas, their maintenance and improvement and for other purposes," reserving, however, to the state of Montana full and complete jurisdiction and authority over all such areas not incompatible with the administration, maintenance, protection, and control thereof by the United States under the terms of said act of Congress.

History: En. Sec. 1, Ch. 156, L. 1941. Compiler's Note

18, 1929, referred to in this section, is compiled in the United States Code as Tit. 16, secs. 715 to 715d, 715e, 715f to 715k, 715l The act of Congress approved February to 715r.

26-1108.1. Consent to acquisition of certain land by United States for transportation of a supplemental water supply for the Benton Lake Wildlife Refuge. Consent of the state of Montana is given to the acquisition by the United States by purchase, gift, devise or lease of a canal right of way approximately sixty-six (66) feet in width, together with an area not to exceed ten acres as a site for a pumping station works; or of land and water within township twenty-two north (22N), range one west (1W); township twenty-three north (23N), range two west (2W); township twenty-three north (23N), range one west (1W); township twenty-three north (23N), range one east (1E); township twenty-three north (23N), range two east (2E), Teton county; township twenty-two north (22N), range one east (1E), Cascade county; and township twenty-three north (23N), range three east (3E), Chouteau county, for the transportation of a supplemental water supply for the Benton Lake National Wildlife Refuge, Cascade county, established by Executive Order No. 5228, November 21, 1929, and as amended by Executive Order No. 2416, July 25, 1940, in accordance with the act of Congress approved February 18, 1929, entitled: "An act to more effectively meet the obligations of the United States under the migratory bird treaty with Great Britain, by lessening the dangers threatening migratory game birds from drainage and other causes

by the acquisition of areas of land and of water to furnish in perpetuity reservations for the adequate protection of such birds; and authorizing appropriations for the establishment of such areas, their maintenance and improvement and for other purposes," reserving, however, to the state of Montana full and complete jurisdiction and authority over all such areas not incompatible with the administration, maintenance, protection and control thereof by the United States under the terms of said act of Congress.

History: En. Sec. 1, Ch. 227, L. 1953. Compiler's Note

The act of Congress approved February

18, 1929, referred to in this section, is compiled in the United States Code as Tit. 16, secs. 715 to 715d, 715e, 715f to 715k, 715l to 715r.

26-1109. Regulation of bird reserve by commission. Upon the acquisition or establishment of any such refuge in Flathead county, state of Montana, the fish and game commission of the state of Montana, acting under its authority to designate areas as resting, feeding and breeding grounds for migratory and other species of birds and wild animals, shall in its discretion establish such areas as a state refuge and adopt such regulations not inconsistent with the regulations of the secretary of the United States department of agriculture governing such areas as it may deem necessary for their protection, and may enter into co-operative agreements or arrangements with the said secretary for the enforcement of the aforesaid act of Congress and the regulations of the secretary of agriculture, and for the maintenance and administration of such refuge.

History: En. Sec. 2, Ch. 156, L. 1941.

26-1110. (3769) Repealed—Chapter 54, Laws of 1957.

Repeal the Twin Buttes game preserve, was repealed by Sec. 1, Ch. 54, Laws 1957. Sec. 30, Ch. 224, L. 1947), relating to

26-1111. (3770) Repealed—Chapter 224, Laws of 1947.

26-1112. (3771) Repealed—Chapter 54, Laws of 1957.

Repeal game preserve, was repealed by Sec. 1, Ch. This section (Sec. 1, Ch. 109, L. 1917), relating to the South Moccasin mountain

26-1113. (3772) Repealed—Chapter 224, Laws of 1947.

26-1114. (3773) Repealed—Chapter 54, Laws of 1957.

Repeal

Blackleaf game and bird preserve, was
This section (Sec. 1, Ch. 114, L. 1921;
Sec. 31, Ch. 224, L. 1947), relating to the

26-1115. (3774) Repealed—Chapter 224, Laws of 1947.

26-1116. (3776.3) Teton-Spring Creek bird preserve. For the better protection and propagation of birds, the following described area in Teton county, state of Montana, is hereby set aside and established as a state bird preserve, to be known as the Teton-Spring Creek bird preserve. All of sections two (2), three (3), four (4), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15), in township twenty-four (24), north, range five (5) west.

History: En. Sec. 1, Ch. 33, L. 1923.

26-1117. (3776.4) Repealed—Chapter 224, Laws of 1947.

26-1118. (3776.14) Repealed—Chapter 171, Laws of 1951.

Repeal This section (Sec. 1, Ch. 91, L. 1933),

serve, was repealed by Sec. 1, Ch. 171, Laws 1951.

relating to the Cherry Creek game pre-

26-1119. (3776.15) Repealed—Chapter 31, Laws of 1949.

Repeal

in Cherry Creek game preserve, was repealed as Sec. 3776.15, Revised Codes 1935 by Sec. 2, Ch. 31, Laws 1949. This section (Sec. 2, Ch. 91, L. 1933), prohibiting hunting except in certain cases

26-1120. Fish and game commission to procure hunting rights on adjoining federal wildlife preserve-certain areas to be open to resident licensees. The Montana fish and game commission shall negotiate for and enter into written agreements with owners, lessors, lessees, or others having control of areas, tracts or parcels of land adjoining or contiguous to any United States federal wildlife preserve including any wildlife refuge for migratory waterfowl in any section of Montana for the purpose of securing equal hunting and shooting rights for all resident holders of fish and game licenses in Montana on such adjoining and contiguous lands, and preventing such preserves from being surrounded by lands whereon such licensees may not enter. The commission shall, further, open or cause to be opened to public hunting and shooting of migratory waterfowl on any roads, lanes and trails not a part of the traveled portion of any federal-aid highway system within a one (1) mile limit from the boundaries of any such preserve or refuge. The commission shall cause any such area, tract, road, lane or trail to be plainly posted with clear signs showing the boundaries of the areas, tracts, roads, lanes or trails open to shooting and hunting by licensees.

History: En. Sec. 1, Ch. 224, L. 1943.

26-1121. Payment for lands authorized. The commission is hereby authorized to negotiate the payment of a reasonable sum to landowners, lessors or lessees for the right of the commission to create a public shooting area upon their lands. The amount that may be paid for such purpose shall rest in the discretion of the fish and game commission.

History: En. Sec. 2, Ch. 224, L. 1943.

26-1122. Assent to act of Congress known as Pittman-Robertson bill reservations. The Congress of the United States having passed an act which was approved on September 2, 1937, and which is known as 50 Federal Statutes 917 of the acts of Congress, wherein it is, among other things, provided that "no money apportioned under this chapter to any state shall be expended therein until its legislature or other state agency authorized by the state constitution to make laws governing the conservation of wildlife shall have assented to the provisions of this chapter and shall have passed laws for the conservation of wildlife, which shall include a prohibition against the diversion of license fees paid by hunters for any other purpose than the administration of said state fish and game department," and since the moneys referred to in the act of Congress are collected in part from the hunters of this state and will not be returned to the state

of Montana except the state of Montana do assent to the act, now, therefore, the state of Montana does assent to the provisions of said act of Congress, which is commonly known as the Pittman-Robertson bill, but such assent is with the express reservations in this act enumerated. The state of Montana does not by the passage of this act, nor by the consent herein given, surrender to the Congress of the United States or any department of the government of the United States any of those rights which are retained by the people of the state of Montana or the state of Montana and which are guaranteed to them by the ninth and tenth amendments to the constitution of the United States, nor shall this act in any manner or at all be construed or held to be the state of Montana's consent to amending the constitution of the United States in any manner or at all relative to its rights, Provided, however, that nothing herein shall be construed as giving consent to the purchase or acquisition of lands by the United States or by any of its departments or officers for establishing migratory bird sanctuaries under the Migratory Bird Conservation Act of the United States, or otherwise, and that the title to all lands acquired under the provisions of this act for wildlife projects and projects constructed thereon shall be and remain in the state of Montana.

History: En. Sec. 1, Ch. 167, L. 1941. Compiler's Note

The act of Congress September 2, 1937,

referred to in this section, is compiled in the United States Code as Tit. 16, secs. 669 to 669b, 669c to 669i.

26-1123. Assent to act of Congress known as Pittman-Robertson bill -authority of fish and game commission. The Montana fish and game commission is hereby authorized to perform such acts as may be necessary to the establishment and conduct of wildlife projects as defined and authorized by said act of Congress, provided every project initiated under the provisions of this act shall be under the supervision of the Montana state fish and game commission, and no laws, rules or regulations shall be passed, made or established, governing the game or fur-bearing animals or the taking or capturing of the same in any such projects, except they be in conformity with the laws of the state of Montana or rules promulgated by the Montana fish and game commission and the title to all lands acquired or projects created from lands purchased or acquired by deed or gift shall vest in, be, and remain in the state of Montana and shall be operated and maintained by it in accordance with the laws of the state of Montana. The Montana fish and game commission shall have no power to accept benefits unless the projects created or established shall wholly and permanently belong to the state of Montana, except as provided in section 26-1124 of this code, and also provided, that nothing contained herein shall prevent the Montana fish and game commission from entering into cooperative agreements on federally owned lands as provided for herein.

History: En. Sec. 2, Ch. 167, L. 1941; amd. Sec. 1, Ch. 80, L. 1951.

26-1124. Co-operation with United States—power to acquire lands. The Montana state fish and game commission in the name of the state and with the approval of the governor shall have the power to enter into the co-operative agreements on federally owned lands with the government of

the United States or some department or bureau thereof, or with an individual or individuals, private corporations or partnership for the purpose of carrying on any wildlife restoration project and established under the provisions of said Pittman-Robertson Act of the Congress of the United States, and shall have the power to acquire by purchase, either for cash or upon installments, or lease or by gift or devise, either individually or in conjunction with the government of the United States or some department or bureau thereof, such lands or other property or interests therein as may be necessary for the purpose of carrying on any wildlife restoration project created and established under the provisions of said Pittman-Robertson bill of the Congress of the United States, and state of Montana does reserve to itself, acting through its legislature, the right to direct the Montana fish and game commission to abandon any wildlife restoration projects created and established as the state of Montana may in its judgment think proper, provided said commission shall have no power to exercise the right of eminent domain to condemn or acquire property under this act

History: En. Sec. 3, Ch. 167, L. 1941; amd. Sec. 2, Ch. 80, L. 1951.

to in this section, is compiled in the United States Code as Tit. 16, secs. 669 to 669b, 669c to 669i.

Compiler's Note

The Pittman-Robertson Act, referred

26-1125. Use of license fee. In accordance with the other requirement of said act of Congress, it shall be the law of this state, so long as this assent shall be unrepealed, that no license fees paid by hunters in the state of Montana shall be used or taken for any other purpose than the administration and use of the department of fish and game of the state of Montana.

History: En. Sec. 4, Ch. 167, L. 1941.

26-1126. Consent to acquisition of certain land by United States for exhibition park for bison and other big game animals. Consent of the state of Montana is given to the acquisition by the United States by purchase, gift, devise or lease of such areas of land or water, or of land and water in section thirty-one (31), township eighteen north (18N), range twenty west (20W), Lake county, Montana, and section thirty-six (36), township eighteen north (18N), range twenty-one west (21W), Sanders county, Montana, excepting the Northern Pacific Railway and state of Montana lands within said sections, as the United States may deem necessary for the establishment of an exhibition park for bison and other big game animals, reserving, however, to the state of Montana full and complete jurisdiction and authority over all such areas not incompatible with the administration, maintenance, protection and control thereof by the United States under the terms of applicable federal regulations.

History: En. Sec. 1, Ch. 209, L. 1953.

26-1127. Development by fish and wildlife service, United States department of the interior. Upon the acquisition or establishment of any such park in Lake county and Sanders county, state of Montana, the fish and wildlife service, United States department of the interior, agrees to

develop, improve and maintain the park for the display of such native big game animals as are available on the national bison range.

History: En. Sec. 2, Ch. 209, L. 1953.

CHAPTER 12

PERMITS FOR BREEDING GAME BIRDS AND ANIMALS—OTHER REGULATIONS

Section 26-1201. Permit for breeding and propagating game birds and animals and fur-bearing animals—migratory birds excluded.

26-1202 to 26-1204. Repealed.

26-1201. (3777) Permit for breeding and propagating game birds and animals and fur-bearing animals—migratory birds excluded. Any person, or persons, firm, company or corporation before engaging in the business or occupation of propagating, owning and controlling game animals, game birds (except migratory game birds), or fur-bearing animals of the state of Montana, shall first procure a game or fur farm permit from the state fish and game director. The owning, controlling, propagating, salvage, banding, transportation, shipping, import, export, acquisition and scientific collecting of migratory game birds shall be in compliance with regulations of the commission adopted pursuant to section 26-320.

Such game or fur farm permit shall be issued to responsible applicants who own or lease the premises on which their operations are to be conducted, when such applicant has so fenced the place where such game or fur farm is located, with fencing material, approved by the state fish and game director, so that no wild or public animal of like species can mix with those confined.

Foundation stock for a fur farm may be obtained from the state fish and game commission by a free permit authorizing game farm permit holders to capture a designated number of fur-bearing animals, with the exception of beaver or marten, for breeding stock, under such rules and regulations as the commission shall prescribe. Such fur-bearing animals captured under permit shall not be sold or pelted for the period of one (1) year after their capture and the skins or pelts of any fur-bearing animals accidentally killed during their capture or for the period of one (1) year thereafter shall be turned over to the state fish and game director.

A charge shall be made for the capture of each beaver or marten by fur farm permit holders for foundation stock, under authorization of the state fish and game warden [director], as follows:

Beaver—fifteen dollars (\$15.00) each.

Marten—twenty-five dollars (\$25.00) each.

The skins, pelts or products of such beaver and marten on game or fur farms shall be tagged individually with tags purchased from the commission for a fee of five (5) cents each. Each game farm or fur farm shall be open to complete inspection by the state fish and game director or his wardens at any reasonable time, inclusive of the whole area thereof, all stock thereon, and all structures, pens, and other devices thereon. Game farm or fur farm permits issued under the provisions of this act shall be valid during the time such game or fur farm is operated and conducted

according to law, provided that on or before January 31 of each year a report shall be submitted by the licensee to the state fish and game director, showing the numbers and species of game or fur-bearing animals on hand on January 1, preceding, and the number and kinds of animals pelted, bought or sold during the year.

Any person or persons, except as herein provided, who, at any time, in any part of the state of Montana, without the consent of the owner or caretaker of any enclosure within which fur-bearing animals are kept for breeding purposes, and on the fence of which enclosure are kept posted notices forbidding trespassing on the premises where the said animals are kept, which notices must be plainly discernible at a distance of not less than twenty-five (25) yards therefrom, shall pass within the said fence or such enclosure or climb over, break or cut through the same for the purpose of entering the said enclosure, etc., or for any other purpose whatsoever, shall be guilty of a misdemeanor, and liable to the penalty hereinafter provided.

Any person or persons, firm, company or corporation engaging in the business or occupation of fox or mink farming whose original foundation stock is or was not captured from the wild in the state of Montana shall apply for and be issued free of charge a numbered certificate of identification for such fur farm, which certificate shall be nontransferable and valid for the life of the business; provided, no other provisions of this section shall be construed to or shall in any manner affect such person, or persons, firm, company or corporation engaging in the business or occupation of fox or mink farming whose original foundation stock is or was not captured from the wild in the state of Montana.

History: En. Sec. 84, Ch. 173, L. 1917; amd. Sec. 1, Ch. 200, L. 1919; re-en. Sec. 3777, R. C. M. 1921; amd. Sec. 31, Ch. 192, L. 1925; amd. Sec. 1, Ch. 73, L. 1933; amd. Sec. 1, Ch. 120, L. 1947; amd. Sec. 1, Ch. 43, L. 1967.

Compiler's Note

The bracketed word was inserted by

the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director.

Collateral References

Game€=5.

38 C.J.S. Game § 15.

26-1202. (3778) Repealed—Chapter 224, Laws of 1947.

26-1203, 26-1204. (3778.1, 3778.2) Repealed—Chapter 185, Laws of 1955.

Repeal
These sections (Secs. 1, 2, Ch. 23, L. 1929; Sec. 32, Ch. 224, L. 1947), relating

to hours of fishing in Georgetown lake, were repealed by Sec. 1, Ch. 185, Laws 1955.

CHAPTER 13

FUR DEALER'S LICENSE AND REGULATION

Section 26-1301. Fur dealers defined.

26-1302. Records to be kept by fur dealers—inspection.

26-1303. Persons required to procure fur dealer's license.

26-1304. Classification and fees for licenses.

26-1305. Time for issuance and expiration of licenses.

26-1306. Penalty for violations.

26-1301. (3778.3) Fur dealers defined. Any person or persons, firm, company or corporation engaging in, carrying on, or conducting wholly or

in part the business of buying or selling, trading or dealing within the state of Montana, in the skins or pelts of any animal or animals, designated by the laws of Montana as fur-bearing or predatory animals, shall be deemed a fur dealer within the meaning of this act.

If such fur dealer resides in or if his or its principal place of business is within the state of Montana, he or it shall be deemed a resident fur dealer. All other fur dealers shall be deemed nonresident fur dealers.

History: En. Sec. 1, Ch. 42, L. 1929.

References

State v. Salina, 116 M 478, 480, 154 P 2d

Collateral References

Licenses@=7 (3), 10. 53 C.J.S. Licenses § 30.

26-1302. (3778.4) Records to be kept by fur dealers—inspection. Every fur dealer shall keep a book in which shall be recorded separately on the date of each transaction the following facts:

- (a) The number and kind of all skins or pelts purchased or sold by such fur dealer.
- (b) The place where such skins or furs were killed or trapped and a separate record of all such skins or pelts as were killed or trapped outside the state of Montana.
- (c) The trapping license number under which such furs or pelts were taken in cases where a trapper's license is required for the taking thereof.
- (d) The names and addresses of the persons to whom such skins or pelts were sold or from whom they were purchased.

Said book shall be open at all reasonable times to the inspection of the state fish and game warden [director] or any of his deputies [wardens], or any United States game warden, and shall be preserved and accessible for one year after the expiration of any license granted to said fur dealer.

History: En. Sec. 2, Ch. 42, L. 1929.

Compiler's Note

The bracketed words were inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

Collateral References

Licenses \$25. 53 C.J.S. Licenses \$35.

26-1303. (3778.5) Persons required to procure fur dealer's license. All fur dealers as defined in this act shall before buying, selling or in any manner dealing in the skins or pelts of any fur-bearing or predatory animal within the state of Montana secure a fur dealer's license from the state fish and game warden [director], provided that no license shall be required for a hunter or trapper selling skins or pelts which he has lawfully taken, nor for any person not a fur dealer who purchases any such skins or pelts exclusively for his own use and not for sale.

History: En. Sec. 3, Ch. 42, L. 1929.

Compiler's Note

The bracketed word was inserted by the compiler since by sections 26-106.1 and 26-106.2 the state fish and game warden was designated as the state fish and game director and all deputy state fish and game wardens were designated as state fish and game wardens.

References

State v. Salina, 116 M 478, 480, 154 P 2d 484.

Collateral References

Licenses \$21 (1), 19 (3). 53 C.J.S. Licenses \$30.

(3778.6) Classification and fees for licenses. The following classes of licenses shall be issued:

Resident fur dealer's license Nonresident fur dealer's license Fur dealer's agent's license

And the following fees charged therefor: Resident fur dealer's license, ten (\$10.00) dollars Nonresident fur dealer's license, fifty (\$50.00) dollars Fur dealer's agent's license, ten (\$10.00) dollars

Any person who is employed by a resident or nonresident fur dealer as a traveling fur buyer shall be deemed a fur dealer's agent. A fur dealer's agent's license may be issued to any person who is employed by a licensed resident or licensed nonresident fur dealer as a fur buyer. Providing that it shall be the responsibility of each and every fur dealer and fur dealer's agent to have the proper license before buying or dealing in furs as defined by section 26-1301.

History: En. Sec. 4, Ch. 42, L. 1929; amd. Sec. 1, Ch. 69, L. 1941; amd. Sec. 1, Ch. 188, L. 1945.

Collateral References Licenses == 29. 53 C.J.S. Licenses § 48.

DECISIONS UNDER FORMER LAW

Not Incumbent upon Agent To Procure or Possess License

Where defendant had been convicted in justice court of buying furs for a fur dealer without a license, a misdemeanor, and again found guilty in district court on appeal, the complaint did not state a public offense, since, under this section as amended in 1941, it was not incumbent upon the agent to procure or possess a license for buying furs, but rather upon the fur dealer to procure a license for himself and his agent. State v. Salina, 116 M 478, 481, 154 P 2d 484.

26-1305. (3778.7) Time for issuance and expiration of licenses. The license required by this act shall be issued annually and shall expire on April 30 of each year and no reduction in the fee charged for said license shall be made in any case where said license runs for less than one year.

History: En. Sec. 5, Ch. 42, L. 1929.

Collateral References Licenses 22, 36. 53 C.J.S. Licenses §§ 39, 42.

(3778.8) Penalty for violations. Any person, firm, company or corporation violating any of the provisions of sections 26-1301 to 26-1305 shall be guilty of a misdemeanor and upon conviction thereof, shall be punishable as provided by section 26-324.

History: En. Sec. 6, Ch. 42, L. 1929; amd. Sec. 33, Ch. 224, L. 1947.

Collateral References Licenses = 40. 53 C.J.S. Licenses § 66.

CHAPTER 14

FISH RESTORATION AND MANAGEMENT PROJECTS

Section 26-1401. Assent to act of Congress known as "Dingell-Johnson" bill. 26-1402. Powers of commission—title to land. 26-1403. Co-operative agreements on federally owned land—acquisition of land -abandonment of projects.

26-1401. Assent to act of Congress known as "Dingell-Johnson" bill. The Congress of the United States having passed an act which was approved on August 9, 1950, and which is known as Public Law 681-81st Congress, Chapter 658-Second Session, wherein it is, among other things, provided that "no money apportioned under this act to any state, except as hereinafter provided, shall be expended therein until its legislature, or other state agency authorized by the state constitution to make laws governing the conservation of fish, shall have assented to the provisions of this act and shall have passed laws for the conservation of fish, which shall include prohibition against the diversion of license fees paid by fishermen for any other purpose than the administration of said fish and game department, except that, until the final adjournment of the first regular session of the legislature held after passage of this act, the assent of the governor of the state shall be sufficient," and since the moneys referred to in the act of Congress are collected in part from the fishermen of this state and will not be returned to the state of Montana except the state of Montana do assent to this act, now, therefore, the state of Montana do assent to the provisions of said act of Congress, which is commonly known as the Dingell-Johnson bill, but such assent is with the express reservations in this act enumerated. The state of Montana does not by the passage of this act nor by the consent herein given, surrender to the Congress of the United States or any department of the government of the United States, any of those rights which are retained by the people of the state of Montana or the state of Montana and which are guaranteed to them by the ninth and tenth amendments to the constitution of the United States, nor shall this act in any manner or at all be construed or held to be the state of Montana's consent to amending the constitution of the United States in any manner or at all relative to its rights. The title to all lands acquired under the provisions of this act for fish restoration and management projects and projects constructed thereon shall be and remain in the state of Montana.

History: En. Sec. 1, Ch. 140, L. 1951. Compiler's Note The act of Congress August 9, 1950, referred to in this section, is compiled in the United States Code as Tit. 16, secs. 777 to 777k.

26-1402. Powers of commission—title to land. The Montana fish and game commission is hereby authorized to perform such acts as may be necessary to the establishment and conduct of fish restoration and management projects as defined and authorized by the said act of Congress, provided every project initiated under the provisions of the act shall be under the supervision of the Montana state fish and game commission, and no laws, rules or regulations shall be passed, made, or established, relating to said fish restoration and management projects, except they be in conformity with the laws of the state of Montana or rules promulgated by the Montana fish and game commission and the title to all lands acquired or projects created from lands purchased or acquired by deed or gift shall vest in, be there remain in the state of Montana and shall be operated and maintained by it in accordance with the laws of the state of Montana. The Montana fish and game commission shall have no power to accept benefits

unless the fish restoration and management projects created or established shall wholly and permanently belong to the state of Montana, except as hereinafter provided.

History: En. Sec. 2, Ch. 140, L. 1951.

26-1403. Co-operative agreements on federally owned land-acquisition of land-abandonment of projects. The Montana fish and game commission in the name of the state and with the approval of the governor shall have the power to enter into co-operative agreements on federally owned lands with the government of the United States or any department or bureau thereof, or with an individual or individuals, private corporations or partnerships for the purpose of carrying on any fish restoration projects created and established under the provisions of this act and shall have the power to acquire by purchase either by cash or upon installments or lease or by gift or by devise or individually or in conjunction with the government of the United States or some department or bureau thereof, such lands or other property of interest therein as may be necessary for the purpose of carrying on any fish restoration and management projects created and established under the provisions of said Dingell-Johnson bill of the Congress of the United States, and the state of Montana does reserve to itself, acting through its legislature, the right to direct the Monana fish and game commission to abandon any fish restoration and management projects created and established as the state of Montana may in its judgment think proper, provided, said commission shall have no power to exercise the right of eminent domain to condemn or acquire property under this act.

History: En. Sec. 3, Ch. 140, L. 1951.

this section, is compiled in the United States Code as Tit. 16, secs. 777 to 777k.

Compiler's Note

The Dingell-Johnson bill, referred to in

CHAPTER 15

CONSTRUCTION AND HYDRAULIC PROJECTS AFFECTING FISH AND GAME

Section 26-1501. Policy of state.

Notice of projects to be given fish and game commission-contents 26-1502. of notice.

26-1503. Investigation of construction plans—technical insufficiency—aid in planning.

26-1504. Notice of commission findings-recommendations and alternative

Refusal by applicant to modify plans—arbitration of disputes. 26-1505.

26-1506. Vested water rights preserved—emergency actions.

26-1507. Irrigation projects exempt.

26-1501. Policy of state. It is hereby declared to be the policy of the state of Montana that its fish and wildlife resources and particularly the fishing waters within the state are to be protected and preserved to the end that they be available for all time, without change, in their natural existing state except as may be necessary and appropriate after due consideration of all factors involved.

History: En. Sec. 1, Ch. 10, L. 1965.

26-1502. Notice of projects to be given fish and game commission—contents of notice. An agency of state government, county, municipality, or other subdivision of the state of Montana, hereafter called applicant, shall not construct, modify, operate, maintain, or fail to maintain, any construction project or hydraulic project which may or will obstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream or its banks or tributaries by any type or form of construction without first causing notice of such planned construction to be served upon the Montana fish and game commission, on forms furnished by the fish and game commission as soon as preliminary plans are completed, but not less than sixty (60) days prior to commencement of final plans for construction. Such notice shall include detailed plans and specifications of so much of said project as may or will affect in any manner specified above any such stream.

History: En. Sec. 2, Ch. 10, L. 1965.

26-1503. Investigation of construction plans—technical insufficiency—aid in planning. The commission shall promptly examine and investigate all such plans. Should the commission determine the plans and specifications furnished with any such application technically insufficient the commission shall so notify the applicant, and may render aid in preparing adequate plans and specifications.

History: En. Sec. 3, Ch. 10, L. 1965.

26-1504. Notice of commission findings—recommendations and alternative plans. Within thirty (30) days after the receipt of such plans, the commission shall notify the applicant whether or not such construction project or hydraulic project will adversely affect any fish or game habitat. If the fish and game commission notifies the applicant that such construction will adversely affect any fish or game habitat, it shall accompany such notice with recommendations or alternative plans which will eliminate or diminish such adverse effect.

History: En. Sec. 4, Ch. 10, L. 1965. Collateral References Fish ≈8. 36A C.J.S. Fish § 31. 22 Am. Jur. 700, Fish and Fisheries, § 45.

26-1505. Refusal by applicant to modify plans—arbitration of disputes. (1) If the fish and game commission notifies the applicant that the construction will adversely affect fish or game habitat, the applicant, within fifteen (15) days after receiving the recommendations and alternatives of the fish and game commission, shall notify the fish and game commission if it refuses to modify its plans in accordance with such recommendations or alternatives. In the event of such refusal, the disagreement shall be arbitrated as provided in subsection (2) of this section.

(2) Upon receipt of such notice of refusal, the fish and game commission shall determine if it wants the disagreement arbitrated. Within ten (10) days after an affirmative determination, and after notice to the other agency or agencies involved, the fish and game commission shall notify, in writing, all district judges of the judicial district or districts in which the project is located that an arbitration board is needed. Within

five (5) days of receipt of notification, such judges shall appoint three (3) people from the county or counties in which the project is located to an arbitration committee. Within ten (10) days after the committee is appointed, it shall meet, hear testimony from all the agencies concerned, and issue a decision signed by at least two (2) members of the committee. The decision shall be binding on all parties concerned. The actual and necessary expenses of the arbitrators shall be divided equally among the agencies involved.

History: En. Sec. 5, Ch. 10, L. 1965.

26-1506. Vested water rights preserved—emergency actions. This act shall not operate or be so construed as to impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States, or in emergencies such as floods, ice jams or other conditions causing emergency handling.

History: En. Sec. 6, Ch. 10, L. 1965.

26-1507. Irrigation projects exempt. This act shall not apply to any state water conservation board irrigation project presently operating, or that may be constructed in the future or to any irrigation district project or any other irrigation project.

History: En. Sec. 7, Ch. 10, L. 1965.

CHAPTER 16

SHOOTING PRESERVES

Section 26-1601. Licenses and permits authorized—rules and regulations. 26-1602. Size and location of preserves—posting of boundaries.

26-1603. Game hunted in preserve—stocking of game required.
26-1604. Fees for licenses or permits.
26-1605. Amount of game recoverable under license or permit.
26-1606. Shooting restrictions established by preserve operators.

26-1607. Duration of season on preserve.
26-1608. Tagging of game taken from preserve.
26-16109. Registration of shooters—records maintained by operator.
26-1610. Hunting of wild game on preserve.
26-1611. Bird license required to hunt on preserve.
26-1612. Commercial and membership licenses and permits—list maintained by commission.

26-1613. Revocation of license or permit—reissuance.

26-1614. Unscheduled imspections by commission.

26-1601. Licenses and permits authorized — rules and regulations. The Montana fish and game commission is hereby authorized and empowered to issue operating licenses or permits for shooting preserves, which may be privately owned and operated, and to make such rules and regulations as may be necessary and proper in carrying out the purposes of this act.

History: En. Sec. 1, Ch. 265, L. 1965.

26-1602. Size and location of preserves—posting of boundaries. Operating licenses or permits may be issued to any person, partnership, association or corporation for the operation of shooting preserves that meet the requirements hereinafter prescribed.

- (a) Each shooting preserve shall be restricted to not more than 1,280 contiguous acres and shall not be located closer than ten (10) miles from another preserve and in areas which will not substantially reduce hunting areas available to the public as determined by the commission.
- (b) The exterior boundaries of each shooting preserve shall be clearly defined and posted with signs erected around the extremity at intervals of 250 feet or less.

History: En. Sec. 2, Ch. 265, L. 1965.

26-1603. Game hunted in preserve—stocking of game required. Game which may be hunted under this act shall be confined to artificially propagated pheasants, quail, chukar partridges, turkeys and such other species as the Montana fish and game commission may add from time to time.

A minimum number of stock of each species to be hunted on a shooting preserve shall be released on the licensed area during the shooting preserve season. The minimum number of stock of each species to be released shall be determined by the Montana fish and game commission before the commencement of the said season.

History: En. Sec. 3, Ch. 265, L. 1965.

26-1604. Fees for licenses or permits. Fees for shooting preserve licenses or permits shall be fifty dollars (\$50) per year for the first 160 acres of shooting preserve area, plus twenty dollars (\$20) per year for each additional 160 acres or parts thereof.

History: En. Sec. 4, Ch. 265, L. 1965.

26-1605. Amount of game recoverable under license or permit. The operating licenses or permits issued by the Montana fish and game commission shall entitle holders thereof, and their members, guests or patrons to recover not more than 80% of the total number of each species of game released on the premises each year.

History: En. Sec. 5, Ch. 265, L. 1965.

26-1606. Shooting restrictions established by preserve operators. Except for required compliance with the game recovery restriction provided in section 26-1605, shooting preserve operators may establish their own shooting limitations and restrictions on the age, sex and number of each species that may be taken by each person.

History: En. Sec. 6, Ch. 265, L. 1965.

26-1607. Duration of season on preserve. In order to give a reasonable opportunity for a fair return on a sizeable investment, the season established for shooting preserves shall be no less than one hundred twenty (120) consecutive days as designated by the Montana fish and game commission during the four (4) month period beginning September 1 and ending December 31.

History: En. Sec. 7, Ch. 265, L. 1965.

26-1608. Tagging of game taken from preserve. All harvested game shall be tagged with a self-sealing tag prior to being either consumed

on the premises or removed therefrom, such tags to remain affixed until the game actually is prepared for consumption. The Montana fish and game commission shall furnish tags at nominal cost to shooting preserve operators, the tags to be numbered consecutively and dated by year of issuance.

History: En. Sec. 8, Ch. 265, L. 1965.

26-1609. Registration of shooters—records maintained by operator. Each shooting preserve operator shall maintain a registration book listing the names, addresses and hunting license numbers of all shooters; the date on which they hunted; the amount of game and the species taken; and the tag numbers affixed to each carcass. An accurate record likewise must be maintained of the total number, by species, of game raised and/or purchased, and the date and number of all species released. These records shall be open to inspection by a delegated representative of the Montana fish and game commission at any reasonable time, and shall be the basis upon which the game-recovery limits in section 26-1605 shall be determined.

History: En. Sec. 9, Ch. 265, L. 1965.

26-1610. Hunting of wild game on preserve. Any wild game found on shooting preserves may be harvested in accordance with applicable game and hunting laws pertaining to open seasons, bag and possession limits, and so forth, as are established regularly by the Montana fish and game commission and the U. S. fish and wildlife service.

History: En. Sec. 10, Ch. 265, L. 1965.

26-1611. Bird license required to hunt on preserve. All persons hunting on shooting preserves must have a valid resident or nonresident game bird license.

History: En. Sec. 11, Ch. 265, L. 1965.

26-1612. Commercial and membership licenses and permits—list maintained by commission. Each shooting preserve license or permit issued by the Montana fish and game commission shall designate whether or not the preserve is open to the public on a commercial basis, or is restricted to a membership or other limited group. In the latter case, the license or permit shall specify that the area is a restricted shooting preserve. The Montana fish and game commission shall maintain accurate listings of the names, addresses, and the location of the property, of all persons to whom shooting preserve licenses or permits are issued; said lists shall be made available in their entirety to anyone requesting same, and shall specify whether the preserves are public or private.

History: En. Sec. 12, Ch. 265, L. 1965.

26-1613. Revocation of license or permit—reissuance. The Montana fish and game commission may revoke any shooting preserve license or permit issued under the authority of this act, when the licensee has violated any of the provisions of this act or any rule or regulation of the state

fish and game commission. After such revocation, a new license or permit may be issued, if in the discretion of the Montana fish and game commission the circumstances so warrant.

History: En. Sec. 13, Ch. 265, L. 1965.

26-1614. Unscheduled inspections by commission. The state fish and game commission shall conduct unscheduled inspections of all shooting preserves licensed under this act to ensure that pertinent statutes as well as the rules and regulations of the state fish and game commission are being followed and obeyed.

History: En. Sec. 14, Ch. 265, L. 1965.

TITLE 27

FOOD AND DRUGS

- Chapter 1. Dairy cattle and slaughterhouses (27-101 to 27-105, 27-108 to 27-120 Repealed), 27-106, 27-107.
 - Regulation, management and sale of insecticides, fungicides, rodenticides, herbicides and other economic poisons, 27-201 to 27-212.
 - 3. State board of food distributors—regulation of food stores and foodstuffs. 27-301 to 27-317.
 - 4. Supervision of milk industry-state milk control board, 27-401 to 27-429.
 - 5. Oleomargarine, 27-501 to 27-523.
 - 6. Food service establishments, markets and manufacturers (27-601 to 27-610 Repealed), 27-611 to 27-625.
 7. Food, Drug and Cosmetic Act, 27-701 to 27-725.

CHAPTER 1

DAIRY CATTLE AND SLAUGHTERHOUSES

Section 27-101 to 27-105. Repealed.

27-106. Tuberculin test of cattle in dairies.

Animals slaughtered under unsanitary conditions-unsanitary con-

ditions defined. 27-108 to 27-120. Repealed.

27-101 to 27-105. (2578 to 2582) Repealed—Chapter 307, Laws of 1967.

branded foods, were repealed by Sec. 27, Ch. 307, Laws 1967. For present law, see secs. 27-709 to 27-713. These sections (Secs. 1 to 5, Ch. 130, L. 1911), relating to adulterated and mis-

27-106. (2583) Tuberculin test of cattle in dairies. The state veterinarian, either in person or by his deputies, shall tuberculin test all cattle used in and about all dairies in the state of Montana, at least once during each calendar year; and all persons, firms or corporations conducting a dairy in this state shall file with the secretary of the state board of health a certificate for each cow hereafter added to his dairy, which certificate shall be signed by a veterinarian approved by the state board of health, and shall state that such cow has been tuberculin tested by him and found to be free from tuberculosis, and such certificate shall contain a description of such cow, which description shall be sufficiently complete to identify the cow; and any person, firm, or corporation using any cow in his dairy, or keeping any cow on his dairy premises, which has not been tuberculin tested and found free from tuberculosis, shall be guilty of a misdemeanor, and shall be deemed guilty of selling milk from diseased cows. For the purpose of this act, any person shall be deemed as conducting a dairy who offers for sale any milk or cream, or who sells milk or cream to any butter factory, creamery, or other place where milk or milk products are manufactured or sold.

History: En. Sec. 6, Ch. 130, L. 1911; re-en. Sec. 2583, R. C. M. 1921.

Cross-References

Keeping cows in unhealthy place, penalty, sec. 94-1206.

Sale of milk from diseased cows, penalty,

sec. 94-35-194.

Collateral References

Animals 29 et seg. 3 C.J.S. Animals § 51 et seq.

Constitutionality of statute for control of diseases of livestock. 65 ALR 525.

27-107. (2584) Animals slaughtered under unsanitary conditions—unsanitary conditions defined. It shall be unlawful for any person, persons, firm, or corporation to sell within this state, or to have within his or their possession with the intent to sell within this state for human food, the carcass or parts of the carcass of any animal which has been slaughtered, prepared, handled, or kept under unsanitary conditions; and unsanitary conditions shall be deemed to exist whenever and wherever any one or more of the following conditions are found to appear, to wit: If the slaughterhouse is dilapidated or in a state of decay; if the floor or side walls are soaked with decaying blood or other animal matter; if efficient fly screens are not provided; if the drainage of the slaughterhouse vard is not efficient; if maggets or filthy pools or hog wallows exist in the slaughterhouse yard or under the slaughterhouse floor; if the water supply used in connection with the cleaning and preparing of the meat is not pure and uncontaminated; if the hogs are kept in the slaughterhouse vard, or fed therein on animal offal, or if the odors of putrification plainly exists in or about the slaughterhouse; if carcasses or parts of carcasses are transported from place to place when not covered with clean white cloths, or if kept in unclean or bad smelling refrigerator or refrigerators, or if kept in unclean or foul smelling storerooms. It shall be unlawful for any person, persons, firm, or corporation to have in his or their possession, with intent to sell, the carcass of any animal or fowl which has died from any cause other than being slaughtered in a sanitary manner, or the carcass or part of the carcass of any animal that shows evidence of any disease, or that came from a sick or diseased animal, or the carcass or part of the carcass of any calf that was killed before it had attained the age of four weeks.

History: En. Sec. 7, Ch. 130, L. 1911; re-en. Sec. 2584, R. C. M. 1921.

Cross-Reference

Unsanitarily slaughtered or handled animal carcasses not to be sold, sec. 46-216.

Collateral References

Animals@=15; Health@=29. 3 C.J.S. Animals §§ 38, 39; 39 C.J.S. Health § 25.

27-108 to 27-110. (2586 to 2588) Repealed—Chapter 307, Laws of 1967.

Repeal

These sections (Secs. 7 to 9, Ch. 130, L. 1911; Sec. 1, Ch. 119, L. 1955), relating to seizure of unwholesome foods, to mis-

branded articles, and to sales in unbroken packages, were repealed by Sec. 27, Ch. 307, Laws 1967. For present law, see secs. 27-705, 27-706, 27-711, and 27-715.

27-111. (2589) Repealed—Chapter 122, Laws of 1965.

Repeal

This section (Sec. 10, Ch. 130, L. 1911; Sec. 1, Ch. 175, L. 1921), relating to the licensing of restaurants and other food

establishments, was repealed by Sec. 12, Ch. 122, Laws 1965. For present law, see secs. 27-611 to 27-625.

27-112, 27-113. (2591, 2592) Repealed—Chapter 307, Laws of 1967.

Repeal

These sections (Secs. 11, 12, Ch. 130, L. 1911; Sec. 2, Ch. 19, L. 1955), relating to enforcement powers of the state board of health, were repealed by Sec. 27, Ch. 307, Laws 1967. For present law, see secs. 27-721 and 27-722.

27-114. (2593) Repealed—Chapter 119, Laws of 1955.

This section (Sec. 13, Ch. 130, L. 1911; Sec. 1, Ch. 73, L. 1929), relating to the director of the food and drugs division, was repealed by Sec. 5, Ch. 119, Laws 1955.

27-115 to 27-120. (2594 to 2599) Repealed—Chapter 307, Laws of 1967.

These sections (Secs. 15 to 17, Ch. 130, L. 1911; Secs. 1 to 3, Ch. 256, L. 1921; Sec. 2, Ch. 73, L. 1929; Secs. 3, 4, Ch. 119, L. 1955), relating to violations of the Pure

Food and Drug Act, were repealed by Sec. 27, Ch. 307, Laws 1967. For present law, see secs. 27-702, 27-705, 27-707, and 27-721.

CHAPTER 2

REGULATION, MANAGEMENT AND SALE OF INSECTICIDES, FUNGICIDES, RODENTICIDES, HERBICIDES AND OTHER ECONOMIC POISONS

Section 27-201. Short title.

27-202. Definitions for purposes of Montana Insecticide, Fungicide, and Rodenticide Act of 1947-state board of health charged with administration and enforcement of act.

Prohibited acts. 27-203.

27-204. Registration.

27-205. Determinations-rules and regulations-uniformity.

27-206. Enforcement. 27-207.

Exemptions. 27-208. Penalties.

27-209. Seizures.

27-210. Agents and appointees of board-delegation of duties.

27-211. Co-operation.

27-212. Separability.

27-201. Short title. This act may be cited as the Montana Insecticide, Fungicide, and Rodenticide Act of 1947.

History: En. Sec. 1, Ch. 263, L. 1947.

2 C.J.S. Adulteration § 3; 28 C.J.S. Druggists § 6; 72 C.J.S. Poisons § 2 et seq.

Collateral References

Adulteration 3; Druggists 5; Poisons @m2.

27-202. Definitions for purposes of Montana Insecticide, Fungicide, and Rodenticide Act of 1947-state board of health charged with administration and enforcement of act. (a) The term "economic poison" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, fungi, weeds, or other forms of plant or animal life or viruses, except viruses or fungi on or in living man or other animals, which the director of the agricultural experiment station of Montana state university shall declare to be a pest.

(b) The term "insecticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects which may be present in any environment whatsoever.

- (c) The term "fungicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any fungi.
- (d) The term "rodenticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating rodents or any other vertebrate animals which the director of the agricultural experiment station shall declare to be a pest.
- (e) The term "herbicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any weed.
- (f) The term "insect" means any of the numerous small invertebrate animals generally having the body more or less obviously segmented, for the most part belonging to the class insecta, comprising six-legged, usually winged forms, as, for example, beetles, bugs, bees, flies, and to other allied classes of arthropods whose members are wingless and usually have more than six (6) legs, as for example, spiders, mites, ticks, centipedes, and wood lice.
- (g) The term "fungi" means all nonchlorophyll-bearing thallophytes (that is, all nonchlorophyll-bearing plants of a lower order than mosses and liverworts) as, for example, rusts, smuts, mildews, molds, yeasts, and bacteria, except those on or in living man or other animals.
 - (h) The term "weed" means any plant which grows where not wanted.
 - (i) The term "ingredient statement" means either:
 - (1) a statement of the name and percentage of each active ingredient, together with the total percentage of the inert ingredients, in the economic poison; or
 - (2) a statement of the name of each active ingredient, together with the name of each and total percentage of the inert ingredients, if any there be, in the economic poison (except Option 1 shall apply if the preparation is highly toxic to man, determined as provided in section 27-205); and, in addition to (1) or (2) in case the economic poison contains arsenic in any form a statement of the percentages of total and water soluble arsenic, each calculated as elemental arsenic.
- (j) The term "active ingredient" means an ingredient which will prevent, destroy, repel, or mitigate insects, fungi, rodents, weeds, or other pests.
- (k) The term "inert ingredient" means an ingredient which is not an active ingredient.
- (l) The term "antidote" means the most practical immediate treatment in case of poisoning and includes first-aid treatment.
- (m) The term "person" means any individual, partnership, association, corporation, or organized group of persons whether incorporated or not.
- (n) The term "board" means the state board of health through the state department of health of the state of Montana, hereby charged with the responsibility of administering and enforcing this act.
- (o) The term "registrant" means the person registering any economic poison pursuant to the provisions of this act.

- (p) The term "label" means the written, printed, or graphic matter on, or attached to, the economic poison, or the immediate container thereof, and the outside container or wrapper of the retail package, if any there be, of the economic poison.
- (q) The term "labeling" means all labels and other written, printed, or graphic matter,
 - (1) upon the economic poison or any of its containers or wrappers;

(2) accompanying the economic poison at any time;

- (3) to which reference is made on the label or in literature accompanying the economic poison, except when accurate, nonmisleading reference is made to current official publications of the United States departments of agriculture or interior, the United States public health service, state experiment stations, state agricultural colleges, or other similar federal institutions or official agencies of this state or other states authorized by law to conduct research in the field of economic poisons
- (r) The term "adulterated" shall apply to any economic poison if its strength or purity falls below the professed standards or quality as expressed on labeling or under which it is sold, or if any substance has been substituted wholly or in part for the article, or if any valuable constituent of the article has been wholly or in part abstracted.

(s) The term "misbranded" shall apply:

(1) to any economic poison if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;

(2) to any economic poison:

- (a) if it is an imitation of or is offered for sale under the name of another economic poison;
- (b) if its labeling bears any reference to registration under this act:
- (c) if the labeling accompanying it does not contain instructions for use which are necessary and, if complied with, adequate for the protection of the public;
- (d) if the label does not contain a warning or caution statement which may be necessary and, if complied with, adequate to prevent injury to living man and other vertebrate animals;
- (e) if the label does not bear an ingredient statement on that part of the immediate container and on the outside container or wrapper, if there be one, through which the ingredient statement on the immediate container cannot be clearly read, of the retail package which is presented or displayed under customary conditions of purchase;
- (f) if any word, statement, or other information required by or under the authority of this act to appear on the labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the labeling) and in such terms as

- to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use, or
- (g) if in the case of an insecticide, fungicide, or herbicide, when used as directed or in accordance with commonly recognized practice it shall be injurious to living man or other vertebrate animals or vegetation, except weeds, to which it is applied, or to the person applying such economic poison.

History: En. Sec. 2, Ch. 263, L. 1947; amd. Sec. 1, Ch. 239, L. 1953; amd. Sec. 220, Ch. 197, L. 1967.

Collateral References
Poisons 1, 2.
72 C.J.S. Poisons §§ 2-4.

27-203. Prohibited acts. (a) It shall be unlawful for any person to distribute, sell, or offer for sale within this state or deliver for transportation or transport in intrastate commerce or between points within this state through any point outside this state any of the following:

- (1) Any economic poison which has not been registered pursuant to the provisions of section 27-203 [27-204] or any economic poison if any of the claims made for it or any of the directions for its use differ in substance from the representations made in connection with its registration, or if the composition of an economic poison differs from its composition as represented in connection with its registration; provided, that, in the discretion of the board, a change in the labeling or formula of an economic poison may be made within a registration period without requiring reregistration of the product.
- (2) Any economic poison unless it is the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one through which the required information on the immediate container cannot be clearly read, a label bearing:
 - (a) the name and address of the manufacturer, registrant, or person for whom manufactured;
 - (b) the name, brand, or trade-mark under which said article is sold; and,
 - (c) the net weight or measure of the content subject, however, to such reasonable variations as the director may permit.
- (3) Any economic poison which contains any substance or substances in quantities highly toxic to man, determined as provided in section 27-205 unless the label shall bear, in addition to any other matter required by this act,
 - (a) the skull and crossbones;
 - (b) the word "poison" prominently, in red, on a background of distinctly contrasting color; and,
 - (c) a statement of an antidote for the economic poison.
- (4) The economic poison commonly known as standard lead arsenate, basic lead arsenate, calcium arsenate, magnesium arsenate, zinc arsenate, zinc arsenite, sodium fluoride, sodium fluosili-

cate, and barium fluosilicate unless they have been distinctly colored or discolored as provided by regulations issued in accordance with this act, or any other white powder economic poison which the board, after investigation of and after public hearing on the necessity for such action for the protection of the public health and the feasibility of such coloration or discoloration, shall, by regulation, require to be distinctly colored or discolored; unless it has been so colored or discolored; provided, that the board may exempt any economic poison to the extent that it is intended for a particular use or uses from the coloring or discoloring required or authorized by this section if it determines that such coloring or discoloring for such use or uses is not necessary for the protection of the public health.

- (5) Any economic poison which is adulterated or misbranded.
- (b) It shall be unlawful:
 - (1) for any person to willfully or maliciously detach, alter, deface, or destroy, in whole or in part, any label or labeling provided for in this act or regulations promulgated hereunder, or to add any substance to, or take any substance from, an economic poison in a manner that may defeat the purpose of this act;
 - (2) for any person to use for his own advantage or to reveal, other than to the board or proper officials or employees of the state or to the courts of this state in response to a subpoena, or to physicians, or in emergencies to pharmacists and other qualified persons, for use in the preparation of antidotes, any information relative to formulas of products acquired by authority of section 27-204.
- (c) One who manufactures or sells an "economic poison" thereby warrants to any buyer or any ultimate user that the product is free from any latent defect arising from the process of manufacture, and also that neither the manufacturer nor seller nor their agents, servants or employees have knowingly used improper materials therein, and also that the product is reasonably fit and suitable for the particular purposes for which it was manufactured and sold.

History: En. Sec. 3, Ch. 263, L. 1947; amd. Sec. 2, Ch. 239, L. 1953; amd. Sec. 1, Ch. 218, L. 1965.

Compiler's Note

The bracketed section number 27-204, was inserted in paragraph (a) (1) by the compiler to correct an apparent error since

the section providing for registration is section 27-204. Section 27-203 was included in the 1965 amendment.

Collateral References Poisons©=2. 72 C.J.S. Poisons § 7

27-204. Registration. (a) Every economic poison which is distributed, sold, or offered for sale within this state or delivered for transportation or transported in intrastate commerce or between points within this state through any point outside this state shall be registered in the office of the board, and such registration shall be renewed annually; provided, that products which have the same formula, are manufactured by the same person, the labeling of which contains the same claims, and the

labels of which bear a designation identifying the product as the same economic poison which may be registered as a single economic poison; and additional names and labels shall be added by supplement statements during the current period of registration; and provided, further, that any economic poison imported into this state, which is subject to the provisions of any federal act providing for the registration of economic poisons and which has been duly registered under the provisions of said act, may, in the discretion of the board, be exempted from registration under this act, when sold or distributed in the unbroken immediate container in which it was originally shipped. The registrant shall file with the board a statement including,

- (1) the name and address of the registrant and the name and address of the person whose name will appear on the label, if other than the registrant;
- (2) the name of the economic poison;
- (3) a complete copy of the labeling accompanying the economic poison and a statement of all claims to be made for it including directions for use; and
- (4) if requested by the board a full description of the test made and the results thereof upon which the claims are based. In the case of renewal of registration, a statement shall be required only with respect to information which is different from that furnished when the economic poison was registered or last reregistered.
- (b) The board, whenever it deems it necessary in the administration of this act, may require the submission of the complete formula of any economic poison. If it appears to the board that the composition of the article is such as to warrant the proposed claims for it and if the article and its labeling and other material required to be submitted comply with the requirements of section 27-203, it shall register the article.
- If it does not appear to the board that the article is such as to warrant the proposed claims for it or if the article and its labeling and other material required to be submitted do not comply with the provisions of this act, it shall notify the registrant of the manner in which the article, labeling, or other material required to be submitted fail to comply with the act so as to afford the registrant an opportunity to make the necessary corrections. If, upon receipt of such notice, the registrant insists that such corrections are not necessary and requests in writing that the article be registered, the board shall register the article, under protest, and such registration shall be accompanied by a warning, in writing, to the registrant of the apparent failure of the article to comply with the provisions of the act. In order to protect the public, the board, on its own motion, may at any time, cancel the registration of an economic poison and in lieu thereof issue a registration under protest in accordance with the foregoing procedure. In no event shall registration of an article, whether or not protested, be construed as a defense for the commission of any offense prohibited under section 27-203.
- (d) Notwithstanding any other provision of this act, registration is not required in the case of an economic poison shipped from one plant

within this state to another plant within this state operated by the same person.

(e) Nothing in this act shall apply to wholesalers or retailers selling economic poisons in the manufacturers' original unbroken packages in Montana.

History: En. Sec. 4, Ch. 263, L. 1947; amd. Sec. 3, Ch. 239, L. 1953.

Collateral References
Poisons©-2.
72 C.J.S. Poisons §§ 2, 8.

27-205. Determinations—rules and regulations—uniformity. (a) The director of the agricultural experiment station of Montana state college is authorized, after opportunity for a hearing,

(1) to declare as a pest any form of plant or animal life or virus which is injurious to plants, men, domestic animals, articles, or substances.

(b) The state board of health is authorized after opportunity for a hearing,

(1) to determine whether economic poisons are highly toxic to

man; and,

- (2) to determine standards of coloring or discoloring for economic poisons, and to subject economic poisons to the requirements of section 27-203 (a) (4).
- (c) The board is authorized, after due public hearing, to make appropriate rules and regulations for carrying out the provisions of this act, including rules and regulations providing for the collection and examination of samples of economic poisons.
- (d) In order to avoid confusion endangering the public health, resulting from diverse requirements, particularly as to the labeling and coloring of economic poisons, and to avoid increased costs to the people of this state due to the necessity of complying with such diverse requirements in the manufacture and sale of such poisons, it is desirable that there should be uniformity between the requirements of the several states and the federal government relating to such poisons. To this end the board is authorized, after due public hearing, to adopt by regulation such regulations, applicable to and in conformity with the primary standards established by this act, as have been or may be prescribed in the United States department of agriculture with respect to economic poisons, as the regulations of the board.
- (e) All rules and regulations promulgated under authority granted by paragraph b (1) (2), paragraph c, and paragraph d, must be approved by the board and, also, by the director of the agricultural experiment station of Montana state college.

History: En Sec. 5, Ch. 263, L. 1947; amd. Sec. 4, Ch. 239, L. 1953.

Collateral References Poisons©=2. 72 C.J.S. Poisons § 2.

27-206. Enforcement. (a) The examination of economic poisons shall be made under the direction of the board for the purpose of determining whether they comply with the requirements of this act. If it shall appear from such examination that an economic poison fails to comply with the provisions of this act, and the board contemplates instituting criminal pro-

ceedings against any person, the board shall cause appropriate notice to be given to such person. Any person so notified shall be given an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding and if thereafter in the opinion of the board it shall appear that the provisions of the act have been violated by such person, then the board shall refer the facts to the county attorney for the county in which the violation shall have occurred with a copy of the results of the analysis or the examination of such article: provided, however, that nothing in this act shall be construed as requiring the board to report for prosecution or for the institution of libel proceedings minor violations of the act whenever it believes that the public interests will be best served by a suitable notice of warning in writing.

(b) It shall be the duty of each county attorney to whom any such violation is reported to cause appropriate proceedings to be instituted and prosecuted in the district court without delay.

(c) The board shall, by publication in such manner as it may prescribe, give notice of all judgments entered in actions instituted under the authority of this act.

History: En. Sec. 6, Ch. 263, L. 1947; amd. Sec. 5, Ch. 239, L. 1953.

27-207. Exemptions. The penalties provided for violations of section 27-203 (a) shall not apply to:

(1) registered pharmacists regulated under the laws of this state, wholesalers or retailers selling economic poisons in the manufacturers' original unbroken packages in Montana;

(2) any carrier while lawfully engaged in transporting an economic poison within this state, if such carrier shall, upon request, permit the board or its designated agent to copy all records showing the transactions in and movement of the articles:

(3) public officials of this state and the federal government engaged in the performance of their official duties; provided that such officials when in charge of large scale control campaigns shall keep accurate records as to the storage and disposal of economic poisons placed under their control;

(4) the manufacturer or shipper of an economic poison for experi-

mental use only,

(a) by or under the supervision of an agency of this state or of the federal government authorized by law to con-

duct research in the field of economic poisons, or

(b) by others if the economic poison is not sold and if the container thereof is plainly and conspicuously marked "For experimental use only—Not to be sold," together with the manufacturer's name and address: provided, however, that if a written permit has been obtained from the board, economic poisons may be sold for experiment purposes subject to such restrictions and conditions as may be set forth in the permit.

History: En. Sec. 7, Ch. 263, L. 1947;

- 27-208. Penalties. (a) Any person violating section 27-203 (a) (1) shall be guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars (\$100.00), nor less than twenty-five dollars (\$25.00).
- (b) Any person violating any provision of this act other than section 27-203 (a) (1) shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars (\$50.00) for the first offense and upon conviction for any subsequent offense shall be fined not more than two hundred fifty dollars (\$250.00), nor less than fifty dollars (\$50.00), provided, that any offense committed more than five (5) years after a previous conviction shall be considered a first offense; and provided, further, that in any case where a registrant was issued a warning by the director pursuant to the provisions of this act, such registrant shall upon conviction of a violation of any provision of this act other than section 27-203 (a) (1) be fined not more than five hundred dollars (\$500.00), or imprisoned for not more than one (1) year, or be subject to both such fine and imprisonment; and the registration of the article with reference to which the violation occurred shall terminate automatically. An article, the registration of which has been terminated may not again be registered unless the article, its labeling, and other material required to be submitted appear to the director to comply with all the requirements of this act.
- (c) Notwithstanding any other provisions of this section, in case any person, with intent to defraud, uses or reveals information relative to formulas of products acquired under authority of section 27-204, he shall be fined not more than five hundred dollars (\$500.00), or imprisoned for not more than one (1) year, or both.
- (d) All fines collected for violations of the provisions of this act shall be paid to the county treasurer of the proper county, who shall remit the same to the state treasurer of the state of Montana, and said moneys shall be placed to the credit of the general fund, as provided by law.

History: En. Sec. 8, Ch. 263, L. 1947. Collateral References

Poisons \$≈ 9.
72 C.J.S. Poisons §§ 7-9.

- 27-209. Seizures. (a) Any economic poison that is distributed, sold, or offered for sale within this state or delivered for transportation or transported in intrastate commerce or between points within this state through any point outside this state shall be liable to be proceeded against in any district court in any county of the state where it may be found and seized for confiscation by process of libel for condemnation:
 - (1) in the case of an economic poison,
 - (a) if it is adulterated or misbranded;
 - (b) if it has not been registered under the provisions of section 27-204;
 - (c) if it fails to bear on its label the information required by this act:
 - (d) if it is a white powder economic poison and is not colored as required under this act.

- (b) If the article is condemned, it shall, after entry of decree, be disposed of by destruction or sale as the court may direct and the proceeds, if such article is sold, less legal costs, shall be paid to the state treasurer; provided, that the article shall not be sold contrary to the provisions of this act: and provided, further, that upon payment of costs and execution and delivery of a good and sufficient bond conditioned that the article shall not be disposed of unlawfully, the court may direct that said article be delivered to the owner thereof for relabeling or reprocessing as the case may be.
- (c) When a decree of condemnation is entered against the article, court costs and fees and storage and other proper expenses shall be awarded against the person, if any, intervening as claimant of this article. History: En. Sec. 9, Ch. 263, L. 1947.
- 27-210. Agents and appointees of board—delegation of duties. board is authorized to appoint and employ such qualified chemists or other qualified personnel, technically educated and trained, as may be necessary and proper to enable it to administer this act, and accomplish its purposes in the public interest; and the board may assign the execution of powers and duties to such personnel, under its continuing supervision; the board may also assign the execution of duties under this act to such employees of the state of Montana, or employees of political subdivisions therein, as the board may from time to time designate in writing, to aid the board in detail administration.

History: En. Sec. 10, Ch. 263, L. 1947; amd. Sec. 7, Ch. 239, L. 1953.

27-211. Co-operation. The board is authorized and empowered to co-operate with, and enter into agreement with any other agency of this state, or political subdivision, the United States department of agriculture, and any other state or agency thereof for the purpose of carrying out the provisions of this act and securing uniformity of regulations, but the board is not empowered to commit the state to an expense not authorized by the legislative assembly.

History: En. Sec. 11, Ch. 263, L. 1947; amd. Sec. 8, Ch. 239, L. 1953.

27-212. Separability. If any provision of this act is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of this act and the applicability thereof to other persons and circumstances shall not be affected thereby.

History: En. Sec. 12, Ch. 263, L. 1947.

CHAPTER 3

STATE BOARD OF FOOD DISTRIBUTORS—REGULATION OF FOOD STORES AND FOODSTUFFS

Section 27-301. Terms defined.

27-302. Board of food distributors.

27-303. Appointment and term of members. 27-304. Recommendations for appointment. 27-305. Officers—election.

27-306. Powers and duties of the state board of food distributors.

27-307. Meetings of the board of food distributors.

27-308. Per diem of members of the board.

27-309. Secretary, bond. 27-310. Food stores—per

27-310. Food stores—permits, offenses for failure to obtain.

27-311. Registration—may suspend, revoke, or refuse to renew—entitled to hearing.

27-312. Quality of food sold—adulteration—who is responsible.

27-313. Fees to be deposited with treasurer—payments to be made.
27-314. Attorney general to be attorney for state board of food distributors—
prosecutions—secretary to assist in enforcement—duties of county
attorneys.

27-315. Licenses to be posted.

27-316. Penalties. 27-317. Title of act.

27-301. Terms defined. As used in this act-

- (a) The term "food store" shall mean a grocery store, restaurant, pool hall, hotel, or other established place regularly licensed by the state board of food distributors, in which food or drinks are compounded, dispensed, vended, or sold at retail.
- (b) The term "food" shall mean all substances, drinks, and preparations other than drugs, offered for sale and intended for human consumption.
- (c) The term "board" or "state board of food distributors" shall mean the Montana state board of food distributors.
- (d) The term "secretary" shall mean the secretary of the Montana state board of food distributors.
- (e) The word "person" shall be construed to include every individual, copartnership, corporation or association, unless the context otherwise requires.
- (f) Masculine words shall include the feminine and neuter and the singular includes the plural.

History: En. Sec. 1, Ch. 49, L. 1939.

36A C.J.S. Food § 3. 22 Am. Jur. 804, Food, § 2.

Collateral References

Food €=2.

DECISIONS UNDER FORMER LAW

Constitutionality

Section 13 (27-313) of the Food Distribution Law of 1939; prior to 1963 amendment, does not offend as against section 10, article XII of the constitution, since the license fees collected are for a specific purpose and are not taxes collected for the ordinary expenses of state or municipal government within the meaning of that provision. Section 14,

later repealed by Sec. 2, Ch. 123, Laws 1943 (omitted), was violative of section 1, article XIII of the constitution, prohibiting the use of taxation moneys for private enterprise although apparently quasi-public. Cramer v. Montana State Board of Food Distributors, 113 M 450, 452, 129 P 2d 96, overruled on another point in 138 M 268, 292, 357 P 2d 22.

27-302. Board of food distributors. The Montana state board of food distributors shall consist of three (3) food distributors, each of whom shall have had at least five (5) consecutive years of practical experience in Montana as a food distributor immediately preceding his appointment, and shall be actively engaged in the distribution of food.

History: En. Sec. 2, Ch. 49, L. 1939.

Collateral References States \$\infty 45. 81 C.J.S. States \$ 66. 27-303. Appointment and term of members. The members of the board shall be appointed by the governor, one in each year, each to serve for a term of three (3) years and until his successor shall have been appointed and qualified. Vacancies shall be filled by appointment for the unexpired term. Any member of the board who, during his incumbency, ceases to be actively engaged in the distribution of food in this state, shall be automatically disqualified from membership. Any member may be removed from office by the governor upon proof of malfeasance or misfeasance in office. The members of the Montana state board of food distributors heretofore appointed and now holding office shall continue until their respective terms expire.

History: En. Sec. 3, Ch. 49, L. 1939.

Collateral References States 26, 51, 52. 81 C.J.S. States §§ 68, 72, 77, 78.

27-304. Recommendations for appointment. The Montana state food distributors association shall recommend five (5) names for each appointment to be made, from which list the governor shall elect.

History: En. Sec. 4, Ch. 49, L. 1939.

27-305. Officers—election. The board shall annually elect from its members a president, a vice-president, a treasurer, and a secretary, who may or may not be a member.

History: En. Sec. 5, Ch. 49, L. 1939.

- 27-306. Powers and duties of the state board of food distributors.

 (a) To regulate the quality of all food sold at retail in this state, using the state and federal pure food and drug acts as the standard.
- (b) It may, by its duly authorized representative, enter and inspect any and all places where food is sold, vended, given away, or manufactured. It shall be unlawful for any person to refuse to permit or otherwise prevent such representative from entering such places and making such inspection.
- (c) To report its proceedings annually to the governor with such information and recommendations as it deem proper, giving the names of all food stores licensed during the year and the items of the receipts and disbursements.
- (d) To employ necessary assistants, and make rules for the conduct of its business.
- (e) To perform such other duties and exercise such other powers as the provisions of the act may require.
- (f) For the purposes aforesaid, it shall also be the duty of the board to make and publish uniform rules and regulations not inconsistent herewith, for carrying out and enforcing the provisions of the act.

History: En. Sec. 6, Ch. 49, L. 1939.

Validity, construction, and application of statutes or ordinances relating to inspection of food sold at retail. 127 ALR 322

Collateral References

Food 5.

36A C.J.S. Food § 15.

22 Am. Jur. 866, Food, § 78 et seq.

27-307. Meetings of the board of food distributors. The board shall meet at least once every six months for the purpose of transacting its business.

History: En. Sec. 7, Ch. 49, L. 1939.

27-308. Per diem of members of the board. Each member of the board shall receive twenty dollars (\$20) per day for his actual services as such, and his necessary expenses in attending meetings.

Histery: En. Sec. 8, Ch. 49, L. 1939; amd. Sec. 1, Ch. 65, L. 1967.

Collateral References States \$\infty\$=60. 81 C.J.S. States \\$ 89.

27-309. Secretary, bond. The secretary shall receive a salary to be fixed by the board and all expenses necessarily incurred by him in the performance of his duties. He shall give such a bond as the board may from time to time require, which bond shall be approved by the board.

History: En. Sec. 9, Ch. 49, L. 1939.

27-310. Food stores—permits, offenses for failure to obtain. The state board of food distributors shall require and provide for the annual registration and licensing of every food store now or hereafter doing business within the state. Upon the payment of a fee of five dollars (\$5.00), the board shall issue a license and provide the insignia designating such store a "certified food store" by the state board of food distributors, to such persons as may be qualified by law to conduct a food store provided such license shall be exposed in a conspicuous place in the food store for which it is issued, and shall expire on the thirtieth day of June following the date of issue. It shall be unlawful for any person to conduct a food store unless such license has been issued to him by the board.

History: En. Sec. 10, Ch. 49, L. 1939; amd. Sec. 1, Ch. 93, L. 1957.

Collateral References Foodcom 3. 36A C.J.S. Food § 12 (1).

Cross-Reference

Carrying on business without license, penalty, sec. 94-1511.

27-311. Registration—may suspend, revoke, or refuse to renew—entitled to hearing. The board may suspend, revoke or refuse to renew any registration or license obtained by false representation or fraud, or when the person to whom license or registration shall have been granted has been convicted for violation of any of the provisions of this act, or for a felony. Before any license can be revoked, the holder thereof shall be entitled to a hearing by the board, upon due notice of the time and place where such hearing shall be held. The accused may be represented by legal counsel, shall be entitled to compulsory attendance of witnesses and shall have the right of appeal to the district court of the proper county on the question of law and fact.

History: En. Sec. 11, Ch. 49, L. 1939.

27-312. Quality of food sold—adulteration—who is responsible. (a) Every proprietor or manager of a food store shall be responsible for the quality of all food sold therein, except for articles sold in the original package of the manufacturer.

- (b) It shall be unlawful for any person or his agent to adulterate any food, or mix any foreign or inert substance with food, for the purpose of adulteration or cheapening same.
- (c) Nothing in this act shall be construed to change any of the provisions of the Pure Food and Drug Act of Montana, being chapter 1 of Title 27.

History: En. Sec. 12, Ch. 49, L. 1939.

Collateral References

22 Am. Jur. 866, Food, § 78 et seq.

Validity, construction, and application of statutes or ordinances relating to inspection of food sold at retail, 127 ALR 322.

Recovery for loss of business resulting from resale of unwholesome food or beverages furnished by another. 17 ALR 2d 1379.

Validity and construction of statutes, ordinances or regulations concerning the sale of horse meat for human consumption. 19 ALR 2d 1013.

27-313. Fees to be deposited with treasurer—payments to be made. All fees received by the state board of food distributors under this act shall be deposited with the state treasurer and deposited in the earmarked revenue fund for the use of the board. No expenses shall be incurred by said board in excess of the revenue derived from such fees.

History: En. Sec. 13, Ch. 49, L. 1939; amd. Sec. 240, Ch. 147, L. 1963.

Collateral References Food© 2. 36A C.J.S. Food § 3.

DECISIONS UNDER FORMER LAW

Constitutionality

This section, prior to 1963 amendment, did not offend against section 10, article XII of the constitution, since the license fees collected are for a specific purpose and are not taxes collected for the ordinary expenses of state or municipal govern-

ment within the meaning of that constitutional provision. Cramer v. Montana State Board of Food Distributors, 113 M 450, 454, 129 P 2d 96, overruled on another point in 138 M 268, 292, 357 P 2d 22.

27-314. Attorney general to be attorney for state board of food distributors — prosecutions — secretary to assist in enforcement — duties of county attorneys. The attorney general of the state of Montana shall be the attorney for the Montana state board of food distributors but said board may employ other counsel. The secretary of the Montana state board of food distributors shall, under such rules and regulations as the board may prescribe, assist the board and the attorney general in the administration and enforcement of this act. It shall be the duty of the county attorney of the county wherein any offense hereunder is committed to prosecute the offender. Such prosecutor is authorized to examine the books of any manufacturer, druggist, storekeeper, or wholesale dealer within the state for the purpose of acquiring information to aid in the prosecution.

History: En. Sec. 15, Ch. 49, L. 1939.

27-315. Licenses to be posted. Any person, persons, firm or corporation, which, under this act, are required to have a license, shall at all times have such license posted in a conspicuous place in their place of business and shall have the same at all times available for inspection and examination by any person or citizen of the state of Montana.

History: En. Sec. 16, Ch. 49, L. 1939.

Collateral References Food \$\infty\$=3. 36A C.J.S. Food § 12 (5). 27-316. Penalties. Any person violating any of the provisions of this act or rules and regulations hereunder, shall be guilty of a misdemeanor, unless otherwise provided.

History: En. Sec. 17, Ch. 49, L. 1939.

Collateral References

Food€=18.

36A C.J.S. Food §§ 39, 41.

27-317. Title of act. The title of this act shall be The Food Distributors Law of 1939.

History: En. Sec. 19, Ch. 49, L. 1939.

Collateral References Food © 2. 36A C.J.S. Food § 3.

CHAPTER 4

SUPERVISION OF MILK INDUSTRY—STATE MILK CONTROL BOARD

Section 27-401. Declaration of policy relating to milk. General purpose. 27-402. 27-403. Definitions. 27-404. Milk control board. General powers of the milk control board. 27-405. 27-406. Markets. 27-407. Minimum price orders. 27-408. Licenses to producers, producer-distributors and distributors. 27-409. Licenses—disposition of income. 27-410. Application for licenses. 27-411. Declining, suspending and revoking licenses. 27-412. Repealed. 27-413. Rules and orders. 27-414. Rules of fair trade practices. 27-415. Entry, inspection and investigation. 27-416. Reports of dealers—accounting system—records. 27-417. Disposition of fines. 27-418. Formation of local associations. 27-417. 27-419. Repealed. 27-420. Hearings-fees. 27-421. Co-operation with other governmental agencies. 27-422. Violations made misdemeanors—penalties. 27-423. Constructions, exceptions and limitations.

27-424. Additional remedies. 27-425. Transfer of assets.

27-426. Bonds required of distributors—amounts—forms and conditions.

27-427. Local advisory boards. 27-428. Judicial review of orders. 27-429. Service of process upon board.

27-401. Declaration of policy relating to milk. It is hereby declared:

(a) That milk is a necessary article of food for human consumption;

(b) That the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare;

(c) That the production, transportation, processing, storage, distribution and sale of milk, in the state of Montana, is an industry affecting the

public health and interest;

(d) That unfair, unjust, destructive and demoralizing trade practices have been and are now being carried on in the production, transportation, processing, storage, distribution, and sale of milk, and products manufactured therefrom, which trade practices constitute a constant

menace to the health and welfare of the inhabitants of this state and tend to undermine the sanitary regulations and standards of content and purity of milk;

- (e) That health regulations alone are insufficient to prevent disturbances in the milk industry and to safeguard the consuming public from further inadequacy of a supply of this necessary commodity;
- (f) That it is the policy of this state to promote, foster and encourage the intelligent production and orderly marketing of milk and cream and products manufactured therefrom; to eliminate speculation and waste, and to make the distribution thereof between the producer and consumer as direct as can be efficiently and economically done, and to stabilize the marketing of such commodities;
- (g) That investigations have revealed and experience has shown that, due to the nature of milk and the conditions surrounding the production and marketing of milk, and due to the vital importance of milk to the health and well-being of the citizens of this state, it is necessary to invoke the police powers of the state to provide a constant supervision and regulation of the milk industry of the state to prevent the occurrence and recurrence of those unfair, unjust, destructive, demoralizing and chaotic conditions and trade practices within the industry, which have in the past affected the industry and which constantly threatened to be revived within the industry and to disrupt or destroy an adequate supply of pure and wholesome milk to the consuming public and to the citizens of this state;
- (h) That milk is a perishable commodity, which is easily contaminated with harmful bacteria, which cannot be stored for any great length of time, which must be produced and distributed fresh daily, and the supply of which cannot be regulated from day to day, but, due to natural and seasonal conditions, must be produced on a constantly uniform and even basis;
- (i) That the demand for this perishable commodity fluctuates from day to day and from time to time making it necessary that the producers and distributors shall produce and carry on hand a surplus of milk in order to guarantee and insure to the consuming public an adequate supply at all times, which surplus must of necessity be converted into byproducts of milk at great expense and ofttimes at a loss to the producer and distributor;
- (j) That this surplus of milk, though necessary and unavoidable, unless regulated, tends to undermine and destroy the milk industry, which causes producers to relax their diligence in complying with the provisions of the health authorities and ofttimes to produce milk of an inferior and unsanitary quality;
- (k) That investigation and experience have further shown that, due to the nature of milk and the conditions surrounding its production and marketing, unless the producers, distributors, and others engaged in the marketing of milk are guaranteed and insured a reasonable profit on milk, both the supply and quality of milk are affected to the detriment of, and against the best interest of the citizens of this state whose health and well-being are thereby vitally affected;
- (1) That, where no supervision and regulation are provided for the orderly and profitable marketing of milk, past experience has shown that

the credit status of both producers and distributors of milk is adversely affected to a serious degree thereby entailing loss and hardship upon all within the community with whom these producers and distributors carry on business relations:

(m) That, due to the nature of milk and the conditions surrounding its production and distribution, the natural law of supply and demand has been found inadequate to protect the industry in this and other states, and in the public interest it is necessary to provide state supervision and regulation of the milk industry in this state.

History: En. Sec. 1, Ch. 204, L. 1939; amd. Sec. 1, Ch. 4, L. 1967.

Cross-References

Bottles and containers, measure regulations, secs. 90-140, 90-141.

Dairy products, sales regulations, sec. 3-2401 et seq.

Keeping cows in unhealthy places, penalty, sec. 94-1206.

Sale of milk from diseased cows, penalty, sec. 94-35-194.

Purpose of Act

Since the Milk Control Act (27-401 et seq.) is aimed at activity which is injurious to health it may be enforced by injunction under section 27-424. Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 517.

Reasonable Profit

Reasonable profit, as used in subsection (k) of this section, contemplates a minimum price at which milk can be sold in view of surrounding circumstances. Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 515.

References

Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 306.

Collateral References

Food \$\infty 2, 4.
36A C.J.S. Food \$\ 3, 14.
22 Am. Jur. 852, Food, \ 60 et seq.

Constitutionality of regulations as to milk. 18 ALR 235; 42 ALR 556; 58 ALR 672; 80 ALR 1225; 101 ALR 64; 110 ALR 644; 119 ALR 243 and 155 ALR 1383.

27-402. General purpose. The general purpose of this law is to protect and promote public welfare and to eliminate unfair and demoralizing trade practices in the milk industry. It is enacted in the exercise of the police powers of the state.

History: En. Sec. 2, Ch. 204, L. 1939; amd. Sec. 2, Ch. 4, L. 1967.

Minimum Prices

The means selected to attain the object set forth in this section is a procedure set forth in section 27-406 whereby the milk control board is empowered to establish

marketing areas in the state and to prescribe and enforce minimum producer, wholesale, and retail prices in such areas pursuant to the provisions of the Milk Control Act (27-401 et seq.) Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 513.

27-403. Definitions. As used in this act, unless the context otherwise requires, "board" means the state agency created by this act, to be known as the Montana milk control board.

"Person" means any person, firm, corporation or co-operative association.

"Producer" means any person who produces milk for consumption within the state, selling same at wholesale to a distributor.

"Distributor" means any person purchasing milk and distributing same for consumption within the state. Said term, however, excludes all persons purchasing milk from a dealer licensed under this act, for resale over the counter at retail, or for consumption on the premises.

"Producer-distributor" means any person both producing and distributing milk for consumption within the state.

"Dealer" means any producer, distributor, or producer-distributor.

"Licensee" means any person who holds a license from the board.

"Association" means any organized group of dealers in a community or marketing area which has been constituted under regulations satisfactory to the board.

"Market" means any area of the state designated by the board as a

natural marketing area.

"Consumer" means any person or any agency, other than a dealer, who purchases milk for consumption or use.

"Milk" means the lacteal secretion of a dairy animal or animals, including such secretions when raw and when cooled, pasteurized, standardized, or homogenized, recombined, concentrated fresh or otherwise processed and all of which is designated as grade A by duly constituted health authority.

Class I milk shall include all bottled or packaged milk, raw, pasteurized and homogenized, low fat, buttermilk, chocolate milk, whipping cream, commercial cream, half and half, skim milk, fortified skim milk, skim milk flavored drinks, and any other fluid milk not specifically classified in this act.

Class II milk shall include milk used in the manufacture of ice cream and ice cream mix, ice milk, sherbet, eggnog, cultured sour cream, cottage cheese, condensed milk, and powdered skim for human consumption.

Class III milk shall include milk used in the manufacture of butter, cheddar cheese, process cheese, livestock feed, powdered skim other than for human consumption, and skim milk dumped.

The board shall have power and authority to assign milk products hereafter developed to the class which in its discretion it determines to be proper.

History: En. Sec. 3, Ch. 204, L. 1939; amd. Sec. 1, Ch. 192, L. 1959; amd. Sec. 3, Ch. 4, L. 1967.

References

Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 306.

27-404. Milk control board. There is hereby constituted a milk control board to consist of five (5) members, who shall be appointed by the governor, with the consent of the senate, for terms of office as herein provided, and with the following qualifications: No appointee shall be connected in any way with the production, processing, distribution, or wholesale or retail sale of milk or dairy products in any manner whatsoever; no appointee shall have held elective or appointive public office during the period of two years immediately preceding his appointment and no appointee shall hold any other public office, either elective or appointive, during his term of office as a member of the milk control board; and not more than three (3) members of the said milk control board shall, at the time of appointment or thereafter during their respective terms of office, be members of the same political party or residents of the same congressional district.

The members of said milk control board shall be appointed within thirty (30) days after passage and approval of this act. The term of office of one member shall expire on July 1, 1960; the term of office of one member shall expire on July 1, 1961; the term of office of one member shall

expire on July 1, 1962; the term of office of one member shall expire on July 1, 1963; the term of office of one member shall expire on July 1, 1964; and each succeeding member shall hold his office for a term of five (5) years and until his successor shall have been appointed and qualified. Any vacancy shall be filled by appointment by the governor, with the consent of the senate as hereinbefore provided, for the unexpired term.

Consumer members of the existing milk control board at the time of the passage of this act may be reappointed by the governor at his discretion for any of the terms above-mentioned and persons whom he shall appoint for those initial terms expiring in 1960, 1961, and 1962 shall be eligible for reappointment to full five-year terms on the board; provided, however, that after 1962 no member other than one who is appointed to fill a vacancy shall be appointed to succeed himself on said board.

Three (3) members of the board shall constitute a quorum for the regular transaction of business.

The board shall choose one (1) of its own members as the chairman, who shall hold office as chairman for one year; provided, election as chairman shall not interfere with that member's right to vote on all matters before the board.

Each member of the board shall receive twenty-five dollars (\$25.00) per diem for each day actually spent in the performance of his official duties, plus his actual necessary traveling and other expenses in going to, attending and returning from meetings of the board and his actual and necessary traveling and other expenses incurred in the discharge of such duties as may be requested of him by a majority vote of the board, but in no event shall a member's per diem payments exceed fifteen hundred dollars (\$1500.00) in any one year.

The board may employ necessary assistants and appoint agents and instrumentalities but all expenditure under this act shall be paid from the receipts hereunder.

The board shall have the power and it shall be its duty to designate an executive secretary who shall serve under the direction and at the pleasure of the board and who shall have charge of the administration of the board's orders, rules, and regulations, and who shall also serve as financial officer of the board and who shall be authorized to accept or receive money paid or to be paid to the board, either as license fees or fines as provided by this aet.

Meetings of the board shall be had at least every sixty (60) days at the call of the chairman or a majority of the board. The salary of the secretary is to be fixed by the board and the state board of examiners. The board shall so enforce the act that there shall be no discrimination against any dealer or consumer.

History: En. Sec. 4, Ch. 204, L. 1939; amd. Sec. 1, Ch. 249, L. 1957; amd. Sec. 2, Ch. 192, L. 1959; amd. Sec. 16, Ch. 177, L. 1965.

Police Power

Since the legislature of Montana has acted in exercise of its police power to supervise the milk industry, section

20, article XV of the Montana constitution relating to price-fixing, is inapplicable. Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 514.

References

Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 306.

- 27-405. General powers of the milk control board. (1) The board is hereby vested with the powers, and it shall be its duty to supervise, regulate and control the milk industry of the state of Montana, including the production, transportation, processing, storage, distribution and sale of milk in the state of Montana for consumption within the state, providing however, that nothing contained in this act shall be construed to abrogate or affect the status, force or operation of any provision of public health laws or the law under which the Montana livestock sanitary board is constituted together with the Montana livestock sanitary board regulations or county board of health regulations, or municipal ordinances for the promotion or protection of the public health, but the board shall have the power to co-operate with the state board of health, the Montana livestock sanitary board or any county or city board of health or the state department of agriculture and industry in enforcing the provisions of this act.
- (2) The board shall have the power and it shall be its duty to investigate all matters pertaining to the production, transportation, processing, storage, distribution and sale of milk in the state of Montana and to conduct hearings upon any subject pertinent to the administration of this act. The board shall have the power to subpoena milk dealers, their records, books and accounts, and any other person from whom information may be desired or deemed necessary to carry out the purposes and intent of this act, and may issue commissions to take depositions of witnesses who are sick or absent from the state or who cannot otherwise appear in person before the milk control board at its offices in the state capitol, provided at least ten (10) days notice is given to the proposed witness.
- (3) It shall be the duty of any sheriff of any county of the state, when requested to do so by the board, to execute any summons, citations or notice which the board may cause to be issued, for which such sheriff shall be authorized to charge the same fee against the funds provided for the milk control board as he might lawfully charge for the same service of such a document if issued from any district court of the state of Montana. Any person, other than a dealer who is cited for violation of the provisions of this act, or cited to show cause why his license should not be revoked, shall receive for his attendance before the milk control board or its duly designated agent the same compensation as is provided for a witness subpoenaed to appear before the district court, which shall be charged against the funds provided for the operation of the milk control board.
- (4) Any duly designated agent of the board may administer oath to witnesses, may call and give notice of price hearings when the board is not in session and may conduct hearings or investigations and any such duly designated agent of the board may sign and issue subpoenas requiring witnesses to appear before him or the board, and in addition to the manner provided above for the execution of subpoenas, summons and citations issued by the milk control board to witnesses or dealers, the board, through its designated agent shall have the power to serve said subpoenas, summons or citations upon any person by sending a copy of such subpoena, summons or citation, through the United States mail, postage prepaid, which said mail shall be registered with return receipt attached and such service shall be complete when said registered mail

shall be delivered to said person and such receipt returned to the board or its designated agent, signed by the person sought to be summoned, subpoenaed, or cited. Obedience to a subpoena, summons or citation, issued by the board or any person authorized and designated by the board to issue said subpoena, summons or citation, may be enforced by application to any judge of the district court of the county in which such subpoena, summons or citation was issued or to any judge of the district court of the county in which such person subpoenaed, summoned or cited resides and said court shall order compliance with said subpoena, summons or citation and upon failure of the witness to attend, to testify, or to produce such books or papers or records as the board may have commanded, such witness may be punished for contempt of court as for failure to obey a subpoena issued by or to testify in a case pending before said court.

(5) The board may act as mediator or arbitrator to settle any controversy or issue pertaining to milk among or between producers, distributors, producer-distributors and/or consumers.

The operation and effect of any provisions of this act, conferring a general power upon the milk control board, shall not impair or limit any specific power or powers granted to the milk control board by this act.

History: En. Sec. 5, Ch. 204, L. 1939; amd. Sec. 3, Ch. 192, L. 1959; amd. Sec. 4, Ch. 4, L. 1967.

Constitutionality

The price-fixing provisions of this section do not offend due process and do not unconstitutionally delegate legislative power. Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 514, 515.

Action for Unpaid Fees

Under section 27-424 the milk control board could maintain an action against a dairy operator for unpaid license and assessment fees imposed upon him by the board between 1958 and 1960 without putting the dairy operator out of business by using the provisions of section 27-411 or subjecting him to the penal provisions of section 27-422. Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 307.

Compromise of Litigation

Since the Milk Control Act (27-401 et seq.) does not foreclose producers from seeking relief from the district court, the milk control board did not have primary jurisdiction of the question of the effect of prior stipulation in compromise of litigation between producers and distributor. Smith v. Baxter, — M —, 419 P 2d 752, 754.

Transportation Costs

Milk control board could give producers the option to share in the cost of moving their milk to outside marketing areas. Heimbichner v. Montana Milk Control Board, 134 M 366, 332 P 2d 922, 924.

Collateral References

Food@=3. 36A C.J.S. Food § 4 (2).

Validity of municipal ordinance imposing requirements on outside producers of milk to be sold in city. 14 ALR 2d 103.

- 27-406. Markets. Pursuant to the declaration of policy relating to milk set forth in section 27-401, the milk control board is vested with the duty and authority to designate natural marketing areas which shall together embrace all the geographical area of the state and to prescribe and enforce minimum producer, wholesale, and retail prices in such areas in the manner set forth in this act; provided, that at all times there shall not be less than five (5) natural marketing areas in the state.
- (a) Natural marketing areas shall be established forthwith throughout the state by the board; provided that before any proposed natural marketing area is established the board, after notice of at least thirty (30) days, shall hold a hearing or hearings, at a place or places within the proposed area, at which producers and distributors doing business within

said proposed natural marketing area, who are licensed by the Montana livestock sanitary board, and the consuming public may present evidence and testify; and in the event the hearing or hearings make it evident to a majority of the board that the establishment of such proposed natural marketing area is in the public interest, the board shall make findings and conclusions and proceed to establish such natural marketing area.

(b) The board shall have the power, from time to time and at its discretion, to adjust and alter the boundaries of natural marketing areas after they have been established, if after a hearing upon notice of at least thirty (30) days to all interested parties it finds and orders such adjust-

ment to be in the public interest.

(c) All previously established marketing areas and all price schedules, rules and regulations issued and promulgated by any previously existing milk control board in this state at the time of passage of this act are in force and effect, are hereby declared to be and remain in force and effect until altered or rescinded in the manner provided by this act.

(d) The board shall at all times maintain current information on quantities of surplus grade A milk available in the various marketing areas throughout the state, and such information shall be available to all interested parties on request.

History: En. Sec. 6, Ch. 204, L. 1939; amd. Sec. 4, Ch. 192, L. 1959.

Constitutionality

The price-fixing provisions of this section do not offend due process. Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 513.

Minimum Prices

The means selected to attain the object

of the Milk Control Act (27-401 et seq.) set forth in section 27-402 is the procedure outlined in this section. Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 513.

References

Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 307.

27-407. Minimum price orders. (1) Orders fixing minimum prices for class I milk. Prior to the fixing of prices for class I milk in any market the board shall conduct a public hearing and admit evidence under oath relative to the matters of its inquiry, at which hearing the consuming public shall be entitled to offer evidence and be heard the same as persons engaged in the milk industry. The board shall by means of such hearing or from facts within its own knowledge, investigate and determine what are reasonable costs and charges for producing, hauling, handling, processing, and/or other services performed in respect to milk and what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and be most in the public interest.

The board shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and prices in adjacent and neighboring areas and states, so that minimum prices which are fair and equitable to producers, distributors and consumers may result.

The board shall, at least ten (10) days prior to the date set for any public hearing on minimum prices, cause notice to be given to the consuming public and the milk industry of the specific factors which shall be taken into consideration in determining costs of production and distribution and of the actual dollars and cents costs of production and distribution which preliminary studies and investigations of auditors or accountants in its employment indicate will or should be shown at the hearing, so that all interested parties will have opportunity to be heard and to question or rebut such considerations as a matter of record.

If the board at any time proposes to base all or any part of any official order fixing minimum prices on class I milk upon facts within its own knowledge, as distinguished from evidence which may be presented to it at a public hearing by the consuming public or the milk industry, the board shall, at least ten (10) days prior to the date set for any public hearing on minimum prices, cause notice to be given to the consuming public and the milk industry of the specific facts within its own knowledge which it will consider, so that all interested parties will have opportunity to be heard and to question or rebut such facts as a matter of record.

The board, after consideration of the evidence produced at such hearing, shall make written findings and conclusions and shall fix by official order:

(a) The minimum prices to be paid by the milk dealers to producers and others for milk. Each order fixing minimum prices shall classify milk by forms, classes, grades or uses as the board may deem advisable and shall specify the minimum prices therefor.

The milk produced in one natural marketing area and sold in another natural marketing area shall be paid for by a distributor or dealer in accordance with the pricing order of the area where produced at the price therein specified of the class or use in which it is ultimately used or sold.

No allowance for freight, other than freight for transportation of milk from the farm to plant, shall be charged to a producer by a distributor or dealer unless it is found and ordered by the board, after notice and hearing in the manner hereinbefore specified, that such an additional freight allowance is necessary to permit the movement of milk in the public interest.

All milk purchased within a natural marketing area by a distributor shall be purchased on a uniform basis. The basis to be used shall be established by the board after the producers and the distributors of the area have been consulted.

- (b) The minimum wholesale prices to be charged for milk in its various forms, classes, grades, and uses when sold by distributors or producer-distributors to retail stores, restaurants, boardinghouses, fraternities, sororities, confectioneries, public and private schools, including colleges and universities, and both public and private institutions and instrumentalities of all types and description.
- (c) The minimum retail prices to be charged for milk in its various forms, classes, grades and uses when sold by distributors, producer-distributors, and retail stores to consumers.

A minimum producer, wholesale or retail price to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, including a reasonable return upon necessary investment.

The board may, upon its own motion, or upon application in writing from any market, or from any party at interest, alter, revise or amend any official order theretofore made by the board provided that before making, revising, or amending any order fixing prices to be charged or paid for class I milk in any of its forms, classes, grades or uses, the board shall hold a public hearing on such matter in the same manner provided herein for the original fixing of prices; provided, further, the board may in its discretion, when it determines the need exists, notice and hold statewide public hearings affecting minimum prices for class I milk in all market areas of the state.

(2) Monthly posting of mandatory minimum prices for class II and class III milk. In order to assure both the supply and quality of milk and to prevent dilution of the minimum prices to be paid for class I milk in the manner above provided, the board shall once each month, without notice or hearing, post and publish to the milk industry minimum prices which shall be paid to producers by grade A distributors for class II and class III milk, in accordance with the following formulae:

Class II

The average spray process nonfat dry milk solids price per pound, f.o.b. Chicago area, as most recently reported by the United States department of agriculture, multiplied by 8.2 (which is the amount of solids not fat in skim milk); plus the average Chicago area butter price (grade A, 92 score), as most recently reported by the United States department of agriculture, multiplied by 4.2 (which is the amount of butter which can be produced from one hundred pounds of 3.5 milk); less an economic adjustment factor which shall be 10.5% of the total of the above two items. In the case of milk containing more or less than 3.5 per cent butterfat, the differential to be employed in computing the price shall be determined by multiplying the above-mentioned Chicago area butter price by .111.

Class III

The average Chicago area butter price (grade A, 92 score) as most recently reported by the United States department of agriculture, less ten per cent (10%); and in addition, when skim milk in this classification is utilized by any distributor, the average spray process nonfat dry milk solids price per pound, f.o.b. Chicago area, as most recently reported by the United States department of agriculture, multiplied by 8.2, less fifty per cent (50%). This act shall in no way be construed to give the board authority to fix wholesale and retail prices of products manufactured from class II or class III milk.

History: En. Sec. 7, Ch. 204, L. 1939; amd. Sec. 5, Ch. 192, L. 1959; amd. Sec. 5, Ch. 4, L. 1967.

Constitutionality

Since the legislature of Montana in enacting this statute acted in the exercise of its police power to supervise the milk industry, section 20, article XV of the Mon-

tana constitution has no application. Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 514.

The price-fixing provisions of this section do not offend due process and do not unconstitutionally delegate legislative power. Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 514, 515.

Authority for Institution of Proceedings

Petition disclosed that "unanimous consent of all members of the board" had been had prior to the institution of the proceeding as required by section 27-424, where the petition states that the executive secretary of the board "as such administrative officer, has the authority of said Board to institute this action on their behalf under the provisions of R. C. M. 1947, § 27-424." State ex rel. Montana Milk Control Board v. District Court, 138 M 179, 355 P 2d 664, 666.

Facts To Be Noticed by Board

If the milk control board proposes to base any part of an official order fixing

minimum prices upon facts within its own knowledge it must give notice of the specific facts which it will consider. State ex rel. Montana Milk Control Board v. District Court, 138 M 179, 355 P 2d 664, 669.

Retail Price

Where retail price charged for some of the milk is more than twice the price paid by the distributor to the producer there is a violation of the statute. Heimbichner v. Montana Milk Control Board, 134 M 366, 332 P 2d 922, 923.

References

Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 307.

DECISIONS UNDER FORMER LAW

Price to Schools

A complaint filed by the milk control board charging creamery with selling milk to public and private schools at less than price designated by its official corder issued in 1957 failed to state a cause of action as the board had no

authority under the law as it existed prior to the 1959 amendment to regulate the price of milk sold to schools. Montana Milk Control Board v. Community Creamery Co., 139 M 523, 366 P 2d 151, 153.

27-408. Licenses to producers, producer-distributors and distributors. In any market, where the provisions of this act apply, it shall be unlawful for any producer, producer-distributor, or distributor to produce, transport, process, store, handle, distribute, buy or sell milk unless such dealer be duly licensed as provided by this act. It shall be unlawful for any such person to buy, sell, handle, process, or distribute milk which he knows or has reason to believe has been previously dealt with or handled in violation of any provision of this act. The board may decline to grant a license, or may suspend or revoke a license already granted, upon due cause and after hearing.

History: En. Sec. 8, Ch. 204, L. 1939.

Cross-Reference

License for producers of milk, sec. 46-232.

Application of Section

License fee exacted by this section and section 27-409 applies to milk which is ultimately sold by a distributor outside an established market area. Heimbichner

v. Montana Milk Control Board, 134 M 366, 332 P 2d 922, 924.

Collection of License Fees

Board may collect license fees based on the whole volume of milk sold by producer whether within a certain marketing area or anywhere else within the state of Montana. Heimbichner v. Montana Milk Control Board, 134 M 366, 332 P 2d 922, 925.

27-409. Licenses—disposition of income. No producer, producer-distributor, or distributor shall engage in the business of producing or selling milk subject to this act in this state without first having obtained a license from the Montana livestock sanitary board and without being licensed under this act by the milk control board. The annual fee for such license from the milk control board shall be two dollars (\$2.00), shall be due and payable on or before the first day of July, commencing in the year 1959 and shall be deposited by said board to the credit of the general fund.

In addition to said annual license fee, the board shall, in each year, on or before the first day of April, for the purpose of securing funds to

administer and enforce this act, levy an assessment upon producers, producer-distributors, and distributors as follows:

- (a) A fee of not more than five cents (5¢) per hundredweight on the total volume of all milk subject to this act produced and sold by a producer-distributor.
- (b) A fee of not more than two and one-half cents $(2\frac{1}{2}\phi)$ per hundredweight on the total volume of all milk subject to this act sold by a producer.
- (c) A fee of not more than two and one-half cents $(2\frac{1}{2}\phi)$ per hundred-weight on the total volume of all milk subject to this act sold by a distributor, excepting that which is sold to another distributor.

Said assessment upon producer-distributors, producers, and distributors shall be paid quarterly on or before the fifteenth (15th) day of July, October, January and April of each year, commencing in July of 1959, and the amount of such assessment shall be computed by applying the fee designated by the board to the volume of milk sold in the calendar quarter immediately preceding.

Failure of any producer, producer-distributor, or distributor to pay said assessment when due shall constitute violation of this act and his license under this act shall thereupon automatically terminate and be null and void and of no effect. Reinstatement of a license so terminated shall be effected by payment of a delinquency fee equal to thirty per cent (30%) of the assessment which was due.

All assessments hereinbefore required to be paid shall be deposited by the milk control board in the earmarked revenue fund; and all costs of administering this act, including the salaries of employees and assistants, per diem and expenses of board members, and all other disbursements necessary to carry out the purpose of this act, shall be paid out of milk control board moneys in such fund.

The rates of assessment above provided are maximum rates, and the board may, if it finds the costs of administering and enforcing this act can be derived from lower rates, fix the rates at a less amount on or before the first day of April in any year.

History: En. Sec. 9, Ch. 204, L. 1939; amd. Sec. 6, Ch. 192, L. 1959; amd. Sec. 157, Ch. 147, L. 1963.

Application of Section

License fee exacted by this section and section 27-408 applies to milk which is ultimately sold by a distributor outside an established market area. Heimbichner v. Montana Milk Control Board, 134 M 366, 332 P 2d 922, 924.

Collection of License Fees

Board may collect fees based on the whole volume of milk sold by producer whether within a certain marketing area or anywhere else within the state of Montana. Heimbichner v. Montana Milk Control Board, 134 M 366, 332 P 2d 922, 925.

References

Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 306.

27-410. Application for licenses. An applicant for license to operate as a producer, producer-distributor, or distributor shall file a signed application upon a blank prepared under authority of the board, and an applicant shall state such facts concerning his circumstances and the nature of the business to be conducted as in the opinion of the board are necessary for the administration of this act. Such application shall certify the applicant to be the holder of all licenses required by the Montana livestock

sanitary board for the conduct of his business and such application shall be accompanied by the license fee required to be paid.

History: En. Sec. 10, Ch. 204, L. 1939; amd. Sec. 7, Ch. 192, L. 1959.

References

Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 306.

27-411. Declining, suspending and revoking licenses. The board may decline to grant a license or may suspend or revoke a license already granted for due cause upon due notice and after hearing. The violation of any provisions of this act or of any lawful order or regulation of the board, the failure or refusal to make required statements or reports, and aggravated delinquency in the payment of license fees or any of them shall be deemed causes for which the board may, at its discretion, suspend or revoke a license, provided that no license shall be fully revoked except upon the approval of a majority of all members of the board.

History: En. Sec. 11, Ch. 204, L. 1939.

Action for Unpaid Fees

Under section 27-424 the milk control board could maintain an action against a dairy operator for unpaid license and assessment fees imposed upon him by the board between 1958 and 1960 without suspending or revoking right of dairy operator to do business by using the provisions of this section. Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 307.

27-412. Repealed—Chapter 192, Laws of 1959.

Repeal

This section (Sec. 12, Ch. 204, L. 1939), relating to the penalty for delinquency in

payment of license fee, was repealed by Sec. 14, Ch. 192, Laws 1959.

27-413. Rules and orders. The board may adopt and enforce all rules and all orders necessary to carry out the provisions of this act. Every rule or order shall be posted for public inspection in the main office of the board for thirty (30) days, and a copy filed in the office of the board, also a copy sent by registered letter to the secretary of each area, excepting an order, directed only to a person or persons named therein, which shall be served by personal delivery of a copy, or by mailing a copy, in the United States mails, with postage prepaid and properly addressed to each person to whom such order is directed, or, in the case of a corporation, to any officer or agent of the corporation upon whom a summons may be served in accordance with the provisions of the statutes of Montana. Such posting, in the main office of the board, of any rule and of any order, not required to be served as above provided, and such filing in the office of the board shall constitute due and sufficient notice to all persons affected by such a rule or order. A rule or order when duly posted and filed or served, as provided in this act, shall have the force and effect of law.

History: En. Sec. 13, Ch. 204, L. 1939.

27-414. Rules of fair trade practices. In addition to the general and special powers heretofore set forth, the board shall have the power to make and formulate reasonable rules and regulations governing fair trade practices as they pertain to the transaction of business among licensees under this act and among licensees and the general public. Such reasonable rules and regulations governing fair trade practices shall contain, but shall not be limited to, provisions regarding the following methods of doing

business which are hereby declared unfair, unlawful, and not in the public interest:

- (a) The payment, allowance, or acceptance of secret rebates, secret refunds, or unearned discounts by any person, whether in the form of money or otherwise.
- (b) The giving of any milk, cream, dairy products, services, or articles of any kind, except to bona fide charities, for the purpose of securing or retaining the fluid milk or fluid cream business of any customer.
- (c) The extension to certain customers of special prices or services not available to all customers who purchase milk of like quantity under like terms and conditions.
- (d) The purchasing, processing, bottling, packaging, transporting, delivering or otherwise handling in any marketing area of any milk which is to be or is sold or otherwise disposed of at less than the minimum wholesale and minimum retail prices established by the board pursuant to this act.
- (e) The payment of a less price than the applicable producer price established by the board pursuant to this act by a distributor to any producer for milk which is distributed to any person, including agencies of the federal, state or local government.

History: En. Sec. 14, Ch. 204, L. 1939; amd. Sec. 8, Ch. 192, L. 1959.

Preparation of Rules and Regulations

This section was not intended to stand independently, but rather as a mandatory guide for the milk control board in preparing its rules and regulations. Montana Milk Control Board v. Community Creamery Co., 139 M 523, 366 P 2d 151, 153

Regulations promulgated by the milk control board governing unfair trade practices were invalid where they failed to encompass all five of the unfair methods of doing business which the legislature expressly stated should be contained in their rules and regulations. Montana Milk Control Board v. Community Creamery Co., 139 M 523, 366 P 2d 151, 154.

Validity of Rules and Regulations

Rules and regulations governing unfair trade practices adopted by the milk control board were invalid where they were not in accordance with the delegated authority of the board. Montana Milk Control Board v. Community Creamery Co., 139 M 523, 366 P 2d 151, 154.

Violation of Fair Trade Practices

A violation of fair trade occurs when a party violates properly promulgated rules and regulations of the milk control board, enacted pursuant to this section. Montana Milk Control Board v. Community Creamery Co., 139 M 523, 366 P 2d 151, 153.

References

Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 306.

27-415. Entry, inspection and investigation. The board, or any person designated for that purpose by the board, shall have access to, and may enter, at all reasonable hours, all places where milk is produced, processed, bottled, handled or stored, or where the books, papers, records, or documents relative to such transactions are kept and shall have the power to inspect and copy the same in any place within the state, and may administer oath, and take testimony for the purpose of ascertaining facts, which, in the judgment of the board, are necessary to administer this act.

History: En. Sec. 15, Ch. 204, L. 1939; amd. Sec. 6, Ch. 4, L. 1967.

Food@=16. 36A C.J.S. Food § 30.

27-416. Reports of dealers—accounting system—records. The board shall have the power to require all persons holding licenses under it to

file with the board such reports at such reasonable or regular time as the board may require, showing such person's production, sale, or distribution of milk, and any information deemed by the board necessary which pertains to the production, sale or distribution of such milk, either under oath or otherwise, as the board may direct, and failure or refusal to file such reports when directed to do so by the board or its duly designated agent shall constitute grounds for the revocation of such person's license and shall constitute a violation for which such person may be fined as hereinafter provided, one or both, at the discretion of the board.

The board shall adopt a uniform system of accounting to be used by the distributor to account for the usage of all milk received by the

distributor.

Every distributor and producer-distributor shall keep the following records:

- (a) A record of all milk, cream or dairy products received, detailed as to location, names and addresses of suppliers, prices paid, and deductions or charges made, and the use to which such milk or cream was put.
- (b) A record of the quantity of each kind of milk or dairy product manufactured and the quantity and price of milk or dairy products sold.
- (c) A full and complete record of all milk, cream or dairy products sold, classified as to kind and grade, showing where sold, and the amount received therefor.
 - (d) A record of the wastage or loss of milk or dairy products.
 - e) A record of the items of handling expense.
- (f) A record of all refrigeration facilities rented or sold for storage purposes to any person, showing types and sizes of the same, the location of said facilities, and the original, or duplicate original, of all agreements covering rental charges therefor.
- (g) A record of all conditional sales of equipment or other property, the location of said property, and the original, or duplicate original, of all conditional sales contracts pertaining thereto.
- (h) A record of all moneys loaned to wholesale customers, the terms and conditions of said loans, and the original evidence of the indebtedness based on said loans.
- (i) Such other records as the board may deem necessary for the proper enforcement of the act.

History: En. Sec. 16, Ch. 204, L. 1939; amd. Sec. 9, Ch. 192, L. 1959.

140 M 38, 367 P 2d 305, 306; Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 516.

References

Montana Milk Control Board v. Maier,

27-417. Disposition of fines. All fines assessed in any court for violation of the provisions of this act shall be paid over by the court to the milk control board or its properly designated agent.

All fines received by the board shall be deposited with the state treasurer and shall be placed by him in the earmarked revenue fund. All such fines assessed for violations of this act, are hereby earmarked for the purposes of this act.

History: En. Sec. 17, Ch. 204, L. 1939; amd. Sec. 158, Ch. 147, L. 1963.

27-418. Formation of local associations. The board shall have power and it shall be the duty of the board to promote and foster in each established market, an association organized under regulations satisfactory to the board and composed of all licensees of the board and designated as the dairymen's association of such market. It shall be the function of such association to promote the mutual interests of its members and of the dairy industry, but its specific function with relation to the board shall be to provide an instrument whereby the licensees within the market may and they shall unitedly co-operate with and be of assistance to the board in determination, assembling and presentation of facts and findings relative to the costs of production, costs of distribution, and other factors upon which price schedules shall be based, and to otherwise counsel and assist the board as opportunity may afford in carrying out and enforcing the provisions of this act.

Such associations are hereby declared to be instrumentalities of the board and as such may receive as compensation for their services and as a means to their efficiency a percentage of the license fees paid to the board from the market so organized not to exceed ten per cent (10%) of the annual total of such license fees.

History: En. Sec. 18, Ch. 204, L. 1939.

27-419. Repealed—Chapter 192, Laws of 1959.

Repeal relating to co-operative corporations, was This section (Sec. 19, Ch. 204, L. 1939), repealed by Sec. 14, Ch. 192, Laws 1959.

27-420. Hearings—fees. Each officer, other than an employee of the board, who serves any subpoena of the board, shall receive the fees legally provided for such service and each witness who appears in obedience to a subpoena, before the board or a member or its agent, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in district courts, which fees shall be audited and paid in the same manner as other expenses are audited and paid upon the presentation of proper vouchers, approved by the board.

No witnesses subpoenaed at the instance of a party other than the board, or one of its members, or its agent, shall be entitled to compensation unless the board shall certify that his or her testimony was material to the matter investigated.

History: En. Sec. 20, Ch. 204, L. 1939.

27-421. Co-operation with other governmental agencies. In order to secure a uniform system of milk control, the board is hereby vested with power, and it shall be its duty to confer and co-operate with the legally constituted authorities of other states and of the United States, including the secretary of agriculture of the United States, and, for the foregoing purposes, the board shall have the power to conduct joint hearings, issue joint or concurrent orders and exercise all its powers under this act.

History: En. Sec. 21, Ch. 204, L. 1939.

27-422. Violations made misdemeanors—penalties. (a) Any person, required by this act to be licensed, who shall produce, sell, distribute, or handle milk in any way, except as a consumer, without first having ob-

tained a license, as required of him by this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding six hundred dollars (\$600.00). Each day's violation of this provision shall constitute a separate offense. A violation of any provision of this act or of any lawful rule or order of the board, including a failure to answer subpoena or to testify before the board, shall be deemed a misdemeanor punishable by a fine not exceeding six hundred dollars (\$600.00), and each day during which such violation shall continue shall be deemed a separate violation.

- (b) The district courts shall have original jurisdiction in all criminal actions for violations of the provisions of this act, and in all civil actions for the recovery or enforcement of fines, provided for in this act, and all such actions, both criminal and civil, shall be instituted, prosecuted and tried in the district court.
- (c) It shall be the duty of the county attorneys and deputy county attorneys, in their respective counties, diligently to attend all inquisitions held under the provisions of this act and diligently to prosecute all violations of the laws of the state relating to the provisions of this act.

History: En. Sec. 22, Ch. 204, L. 1939.

Action for Unpaid Fees

Under section 27-424 the milk control board could maintain an action against a dairy operator for unpaid license and assessment fees imposed upon him by the board between 1958 and 1960 without subjecting the dairy operator to penal provisions of this section. Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 307.

Nuisance

A sale of milk at a price less than the minimum prescribed by the milk control board under section 27-407, being a violation of this section, is a nuisance which may be enjoined by the board under section 27-424. Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 517.

References

State v. Peterson, 138 M 257, 356 P 2d 925, 926.

27-423. Constructions, exceptions and limitations. The license required by this act shall be in addition to any other license required by any statute of Montana or any municipality of the state of Montana. This act shall apply to every part of the state of Montana.

If any portion of this act is held invalid or unconstitutional such holding shall not affect the validity of the act as a whole, or any part thereof which can be given effect without the part so held to be unconstitutional or invalid.

No provision of this act shall apply or be construed to apply to foreign or interstate commerce except in so far as the same may be effective in compliance with the United States constitution, and with the laws of the United States. It is the intention of the legislature, however, that the instant, whenever that may be, that the handling, within the state by a dealer, of milk produced outside of the state, becomes the subject of regulation by the state in the exercise of its police powers, the provisions of this act, affecting intrastate milk, shall immediately apply and the powers conferred by this act shall attach thereto.

History: En. Sec. 23, Ch. 204, L. 1939.

Collection of License Fees

Milk control board may collect license fees based on whole volume of milk sold

by producer whether within a certain marketing area or anywhere else within the state of Montana. Heimbichner v. Montana Milk Control Board, 134 M 366, 332 P 2d 922, 925.

27-424. Additional remedies. The board or its authorized agent may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of this act or to enforce compliance with any order, rule or regulation, of the board pursuant to the provisions of this act or to obtain a judicial interpretation of any of the foregoing, and in addition to any other remedy, the board, after unanimous consent of all members of the board, may apply to the district court of the district wherein the action arises, for relief by injunction, mandamus or any other appropriate remedy in equity without being compelled to allege or prove that an adequate remedy at law does not otherwise exist, nor shall the board be required to give or post bond in any action to which it is a party whether upon appeal or otherwise. All legal actions may be brought by or against the board in the name of the Montana milk control board and it shall not be necessary in any action to which the board is a party that such action be brought by or against the state of Montana on relation of the Montana milk control board. The board shall have the power to institute action by its own attorney or counselor, but it shall have the right, if it deems advisable, to call upon any county attorney to represent it in the district court, of the county in which the action is taken, or the attorney general to represent it on appeal to the supreme court of Montana, or it may associate its own counselor with either in any court.

History: En. Sec. 24, Ch. 204, L. 1939.

Action for Unpaid Fees

A complaint by the milk control board against a former operator of a dairy for unpaid license and assessment fees imposed upon him by the board between 1958 and 1960 stated a cause of action, the board having complied with the provisions of this section. Montana Milk Control Board v. Maier, 140 M 38, 367 P 2d 305, 307.

Enforcement of Regulations

The Montana milk control board may restrain a dairy from selling milk for consumption at a price less than the minimum set under section 27-407 by the board. Montana Milk Control Board v. Rehberg, 141 M 149, 376 P 2d 508, 517.

Facts To Be Noticed

If the milk control board proposes to

base any part of an official order fixing minimum prices upon facts within its own knowledge it must give notice of the specific facts which it will consider. State ex rel. Montana Milk Control Board v. District Court, 138 M 179, 355 P 2d 664, 669.

Unanimous Consent of Board

Petition disclosed that "unanimous consent of all members of the board" had been had prior to the institution of the proceeding as required by this section, where the petition states that executive secretary of the board "as such administrative officer, has the authority of said board to institute this action on their own behalf under the provisions of R. C. M. 1947, § 27-424." State ex rel. Montana Milk Control Board v. District Court, 138 M 179, 355 P 2d 664, 666.

27-425. Transfer of assets. All assets, appurtenances and funds of the previously existing milk control board are hereby transferred to the herein created board.

History: En. Sec. 25, Ch. 204, L. 1939.

27-426. Bonds required of distributors—amounts—forms and conditions. Every distributor before purchasing any milk from a producer shall execute and deliver to the milk control board a surety bond in the minimum sum of one thousand dollars (\$1,000), executed by the applicant as principal and by a surety company qualified and authorized to do busi-

ness in this state as surety. Said bond shall be upon a form approved by the board and shall be conditioned upon the payment in the manner required by this act, of all amounts due to producers for milk purchased by such licensee or applicant during the license year. Said bond shall be to the state in favor of every producer of milk. In case of failure by a distributor to pay any producer or producers for milk in the manner required by this act, the board shall proceed forthwith to ascertain the names and addresses of all producer-creditors of such distributor, together with the amounts due and owing to them and each of them by such distributor, and shall request all such producer-creditors to file a verified statement of their respective claims with the board. Thereupon the board shall bring an action on the bond on behalf of said producer-creditors. Upon any action being commenced upon said bond, the board may require the filing of a new bond; and immediately upon a recovery in any action upon such bond, such distributor shall file a new bond; and upon failure to file same within ten (10) days in either case, such failure shall constitute grounds for the revocation or suspension of the license of such distributor. In the event that recovery upon the bond is not sufficient to pay all of the claims as finally determined and adjudged by the court, any such amount recovered shall be divided pro rata among said producer-creditors.

The minimum bond of one thousand dollars (\$1,000) shall be required of distributors purchasing an average daily quantity of milk of less than one hundred gallons; distributors purchasing an average daily quantity of one hundred gallons and less than two hundred gallons during any calendar month during a license year shall post a bond in the amount of two thousand dollars (\$2,000); distributors purchasing an average daily quantity of two hundred gallons and less than three hundred gallons during any calendar month during a license year shall post a bond in the amount of three thousand dollars (\$3,000); distributors purchasing an average daily quantity of three hundred gallons or more during any calendar month during a license year shall post a bond in the sum of five thousand dollars (\$5,000).

In the event that any distributor so increases his purchases of milk during the license year that said purchases exceed the amount for which said distributor is bonded, said distributor shall forthwith post such additional bond or bonds as may be required to comply with the provisions of this section.

The board is authorized to require any distributor to furnish a bond or bonds in addition to those specified above if, after notice and hearing and upon good cause shown, it determines such additional bond or bonds are required to assure payment of all amounts due or to become due to producers.

Failure of any distributor who purchases milk from producers to execute and deliver the bond as herein provided and required shall constitute a violation of this act; failure of any such distributor to post such additional bond or bonds as may be required to comply with the provisions of this act shall likewise constitute a violation of this act.

History: En. Sec. 10, Ch. 192, L. 1959; amd. Sec. 7, Ch. 4, L. 1967.

Compiler's Note

Section 8 of Ch. 4, Laws 1967 read "If any section, subdivision, sentence or word

of competent jurisdiction to be unconstitutional or inoperative, such determina-

of this act shall be determined by a court . tion shall not affect the remaining portions of this act."

27-427. Local advisory boards. Whenever a public hearing is scheduled by the milk control board in any marketing area for the purpose of fixing prices, the board shall, at least ten (10) days prior to the date set for such hearing, appoint a local advisory board, the function of which shall be to assist and advise the milk control board in matters pertaining to the production and marketing of milk in said marketing area. The local advisory board shall consist of two producers and two distributors, who are respectively actively engaged in milk production and distribution in the area. Such local advisory board shall meet with the milk control board at the call of the milk control board before, during, or after such public hearing to fix prices; and a verbatim transcript of all matters and things discussed by the milk control board with such local advisory board at all such conferences or meetings shall be prepared and shall be considered a part of the record of the hearing. The members of such local advisory board shall serve without pay, but in case conferences or meetings with the milk control board are held outside of the marketing area in which they produce or distribute milk they shall be entitled to receive actual and necessary expenses incurred in attending such meetings or conferences. In no event shall there be more than three meetings or conferences between the milk control board and such local advisory board; and in all events such local advisory board shall cease to exist when the milk control board promulgates its decision or order fixing prices following the public hearing heretofore mentioned.

History: En. Sec. 11, Ch. 192, L. 1959.

Judicial review of orders. Any person or persons, jointly or severally, aggrieved by any decision or order of the milk control board may present to a court of record a petition, duly verified, setting forth that such decision or order is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within twenty (20) days after the filing and posting of the decision or order in the office of the board as required by section 27-413.

Upon presentation of such petition, the court may allow a writ of certiorari directed to the board to review such decision or order of the board and shall prescribe therein the time within which a return thereto must be made to the court and served upon the relator's attorney, which shall not be less than ten (10) days and may be extended by the court. The writ shall command the board to certify fully to the court, at a specified time and place, a transcript of the record and proceedings, describing or referring to them with convenient certainty; that the same may be reviewed by the court, and may command the board to desist from further proceedings in the matter to be reviewed.

The board shall not be required to return the original papers acted upon by it, but it shall be sufficient for the board to return certified or sworn copies thereof, or of such portions thereof, as may be called for by such writ.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made.

When any such writ is granted, the cause shall have precedence upon the calendar of the court, and judgment and decree shall be entered therein as expeditiously as possible. The court shall affirm, modify, or reverse the decision or order of the board in accordance with law.

History: En. Sec. 12, Ch. 192, L. 1959.

27-429. Service of process upon board. When any petition or complaint is filed in any court naming the milk control board as a party, process may be served upon said board by delivering to, and leaving with, the executive secretary of said board, at his office, at the state capitol, a true copy of the summons, writ, or order, as the case may be, and a true copy of the complaint, petition, or application upon which such summons, writ, or order was based. In case of the absence of the executive secretary from his office, the assistants, clerks, auditors, accountants, or other personnel in his said office shall accept and receipt for such service.

History: En. Sec. 13, Ch. 192, L. 1959.

CHAPTER 5

OLEOMARGARINE

Section 27-501. Short title and legislative intent.

27-502. Definitions.

27-503. Prohibited acts.

27-504. Repealed.

27-505. Jurisdiction.

27-506. Repealed. 27-507. Sanitary control of oleomargarine products.

27-508. Sampling and testing of oleomargarine products.

27-509. Test of samples—rules of evidence. 27-510. Condemnation of unfit products.

27-511. Standard oleomargarine measure.

27-512. 27-513. Fat content requirement for oleomargarine.

Wrapping oleomargarine and marking package. 27-514. Reports by manufacturers of oleomargarine.

27-515. Wholesale licenses.

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27-519. Power of commissioner of agriculture to promulgate rules and regu-

Construction-articles excepted. 27-520.

Serving of yellow oleomargarine in public eating places regulated. Advertising of oleomargarine regulated.

27-523. Penalty.

27-501. Short title and legislative intent. This act shall be cited as the "Oleomargarine Law," and is intended to legalize, and regulate the commerce within the state of Montana of oleomargarine, both white and colored and to protect consumers from confusion, deception, and unfair trade practices in the traffic in yellow oleomargarine.

History: En. Sec. 1, Ch. 138, L. 1949; amd. Sec. 1, Ch. 99, L. 1953.

Collateral References Food © 3. 36A C.J.S. Food § 18.

- 27-502. **Definitions.** (a) For the purposes of this act the following manufactured substances, mixtures, and compounds with or without butter, milk, skim milk, or cream are and shall be considered "oleomargarine";
- (1) All substances heretofore known as oleomargarine, oleo, margarine, oleomargarine oil, butterine, lardine, suine and neutral.
- (2) All mixtures and compounds containing any edible oils or fats other than milk fat, and all mixtures and compounds containing milk fat, if (Λ) made in imitation or semblance of butter, or (B) calculated or intended to be sold as butter or for butter or as butter substitutes, or (C) churned, emulsified, or mixed in cream, milk, skim milk, water, or other liquid and containing moisture in excess of one per centum (1%) with or without common salt.
- (b) For the purposes of this act "yellow oleomargarine" is "oleomargarine" as defined in subsection (a) of this section, having a tint or shade containing more than one and six-tenths degrees (1.6°) of yellow, or of yellow and red collectively, but with an excess of yellow over red, measured in terms of the Lovibond tintometer scale or its equivalent.
 - (c) For the purposes of this act:
- (1) The word "manufacturer" means any person licensed by the state of Montana for the purpose of engaging in the making, producing, processing or forming of oleomargarine by any method, means or process;
- (2) The word "wholesaler" means any person licensed by the state of Montana for the purpose of distributing or reselling oleomargarine to a retailer:
- (3) The word "retailer" means any person who comes into possession of oleomargarine for the purpose of selling or distributing it to the consumer;
- (4) The word "person" means one or more individuals, firms, corporations, partnerships or associations.

History: En. Sec. 2, Ch. 138, L. 1949.

27-503. Prohibited acts. The manufacture, sale, offering or exposing for sale, transportation, serving in a public eating place, having in possession with intent to sell of yellow oleomargarine except in the manner provided by this act are hereby prohibited.

History: En. Sec. 3, Ch. 138, L. 1949; amd. Sec. 2, Ch. 99, L. 1953.

27-504. Repealed—Chapter 99, Laws of 1953.

Reneal

This section (Sec. 4, Ch. 138, L. 1949), providing the penalty for a violation of sections 27-503 or 27-506, was repealed by

Sec. 9, Ch. 99, Laws 1953. The present penalty section for section 27-503 is section 27-523.

27-505. Jurisdiction. The district court shall have jurisdiction to restrain violations of section 27-503, and shall have jurisdiction of all offenses and actions under this act.

History: En. Sec. 5, Ch. 138, L. 1949.

27-506. Repealed—Chapter 99, Laws of 1953.

Repeal
This section (Sec. 6, Ch. 138, L. 1949),
relating to a condemnation of yellow oleo-

margarine, was repealed by Sec. 9, Ch. 99, Laws 1953.

27-507. Sanitary control of oleomargarine products. The commissioner of agriculture or his authorized agent, acting upon reasonable cause. may order to be closed any factory, plant or place where oleomargarine is manufactured, when he finds such factory, plant or place not to be kept in a sanitary condition, and may order to cease sale, distribution or exchange of oleomargarine any wholesaler or jobber whose facilities for the storage, shipping or handling of oleomargarine are found not to be kept in a sanitary condition. Any manufacturer ordered to close, or any wholesaler or jobber ordered to cease sale, distribution or exchange of oleomargarine, as aforesaid, who shall violate such order by resuming the manufacture, or by resuming the sale, distribution or exchange of oleomargarine before authorization so to do by the commissioner of agriculture or his authorized agent, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars (\$25.00), nor more than two hundred and fifty dollars (\$250.00), or by imprisonment in the county jail for not less than ten (10) days, nor more than thirty (30) days, or by both such fine and imprisonment. In addition to such fine or imprisonment, any person or persons, firm or corporation manufacturing, or wholesaling or jobbing oleomargarine after being ordered to close or cease manufacture, sale, distribution or exchange, and before receiving notice to resume such operation, who shall violate such order by resuming operation, shall be subject to payment of an additional fine of twenty-five dollars (\$25.00) for each day the manufacture, wholesaling or jobbing is continued in violation of such order, upon conviction of operation in violation of such order, and upon order of the court. The commissioner of agriculture or any of his authorized agents shall have the right to enter any manufacturing plant or place, factory, building, store, railroad depot, express office, storage facility, shipping facility or handling facility, or other place where oleomargarine is produced, manufactured, sold or kept in commercial storage or while in intrastate transit from one place to another, for the purpose of inspection of such oleomargarine to obtain samples of the same for testing or analysis.

History: En. Sec. 7, Ch. 138, L. 1949.

Collateral References Food \$\infty\$ 8. 36A C.J.S. Food § 6 (4).

27-508. Sampling and testing of oleomargarine products. The department of agriculture is hereby charged with the duty to provide suitable means for the taking of samples of all oleomargarine products.

Said department shall have the authority and it shall be its duty to take such samples from any person, firm or corporation engaged in the handling, manufacturing, wholesaling or jobbing of oleomargarine, but the agent of the department taking the same must at the time of such taking, pay or offer to pay for them at their full value, and if payment is accepted, such agent must take a receipt for the same from the person from whom the samples are obtained.

Said department shall have the authority and it shall be its duty to conduct the Lovibond tintometer test for determination of "yellow oleomargarine," as defined in section 27-502 (b) hereof, and the commissioner of agriculture is hereby authorized and empowered to promulgate and enforce such reasonable rules and regulations relating to such test as may be necessary to effect enforcement of this act.

History: En. Sec. 8, Ch. 138, L. 1949.

Compiler's Note

The compiler has, pursuant to section 3-101.1, substituted "department of agri-

culture" for "department of agriculture, labor and industry" and "commissioner of agriculture" for "commissioner of agriculture, labor and industry" in this section.

27-509. Test of samples—rules of evidence. The department of agriculture may require a chemist from the state board of health to test and analyze samples of oleomargarine taken by it. All such samples and the record of their analysis or test, when identified as to the sample of the record thereof by the oath of the officer taking the same, or when verified as to the analysis or test by the oath of the chemist making the same, shall be admissible in evidence in any court of this state or in any prosecution for the violation of this act or for the violation of any rule or regulation of the department as prima facie evidence of the facts disclosed thereby.

History: En. Sec. 9, Ch. 138, L. 1949. Compiler's Note

The compiler has, pursuant to section

3-101.1, substituted "department of agriculture" for "department of agriculture, labor and industry" in this section.

27-510. Condemnation of unfit products. The commissioner of agriculture, in person or through his agents or employees, is hereby authorized to condemn any oleomargarine which is found to be impure, unclean, unwholesome or stale, or that is produced, manufactured, handled, shipped or kept in an unsanitary place, or that is adulterated (as the word "adulterated" is defined by section 27-102); and, he shall have the power, acting in person or through his agents or employees, upon proper finding and order, to cause to be destroyed such condemned oleomargarine.

History: En. Sec. 10, Ch. 138, L. 1949.

Compiler's Notes

The compiler has, pursuant to section 3-101.1, substituted "commissioner of agriculture" for "commissioner of agriculture, labor and industry" in this section.

Section 27-102, referred to in this section, has been repealed. A definition of adulterated food is now contained in sec. 27-710.

27-511. Standard oleomargarine measure. The standard measure for the sale of oleomargarine, in the state of Montana, shall be sixteen (16) ounces, (avoirdupois weight) to the pound, exclusive of the wrapper or container, no tolerance in deficiency being allowed. All oleomargarine sold, offered or exposed for sale shall be in packages, paper containers or wrappers of one (1) or two (2) pounds, net standard avoirdupois weight, no tolerance for deficiency being allowed; provided, however, that packages of the weight specified may be made up of smaller component packages of wrapped oleomargarine in multiples of four (4) or eight (8) ounces each.

History: En. Sec. 11, Ch. 138, L. 1949.

27-512. Fat content requirement for oleomargarine. Any product manufactured, sold, exchanged, offered or exposed for sale or exchange as oleomargarine shall contain not less than eighty per centum (80%) vegetable or animal fat, no tolerance for deficiency being allowed.

History: En. Sec. 12, Ch. 138, L. 1949.

27-513. Wrapping oleomargarine and marking package. All oleomargarine sold or exchanged, or offered or exposed for sale or exchange at retail in the state of Montana, wherever manufactured, must be wrapped in parchment paper, cellophane, plastic material, or other suitable wrapping material, and must have the wholesaler's or manufacturer's name clearly printed in a conspicuous place on the outside of the package in which sold. Further, on the outside of each such package shall be plainly marked, stamped, labeled or printed in plain, bold-faced letters, one-half (1/2) inch high, the word "oleomargarine." And there shall also be plainly marked, stamped, labeled or printed thereon a statement of the name, and the quantity per pound of all preservatives, vitamins, vitamin extracts or other artificial ingredients used therein, or added thereto. On the outside of each package of oleomargarine so sold or exchanged or offered for sale or exchange shall appear, in addition to the foregoing, the words "16 ounces net weight," "1 lb. net weight," "32 ounces net weight," or "2 lbs. net weight" as are appropriate identification of the weight of the contents of such package.

History: En. Sec. 13, Ch. 138, L. 1949.

27-514. Reports by manufacturers of oleomargarine. Every person, firm or corporation manufacturing oleomargarine within this state is hereby charged with the duty of rendering to the department of agriculture, once a month, not later than the tenth day of each month, a full report of the amount of oleomargarine manufactured during the preceding month. If one person, firm or corporation carries on both manufacturing and whole-saling or jobbing, then a separate report reflecting the manufacturing operation, as required hereinabove shall be filed. Any person failing to render the report required by this section, or failing to make said report when due, shall be guilty of a misdemeanor and subject to the penalties provided in section 27-518 for the violation of the provisions of this act.

History: En. Sec. 14, Ch. 138, L. 1949. Compiler's Note 3-101.1, substituted "department of agriculture" for "department of agriculture, labor and industry" in this section.

The compiler has, pursuant to section

27-515. Wholesale licenses. It shall hereafter be unlawful for any person, firm or corporation, by himself, his or its servant or agent, to sell, exchange or offer for sale at wholesale, or have in his or its possession with intent to sell or offer for sale or exchange at wholesale any oleomargarine, as herein defined, without first securing an annual license from the department of agriculture of the state of Montana to conduct such sale or exchange. The fee for such license shall be twenty dollars (\$20.00) each year. Those persons, firms or corporations having a license from said department permitting them to manufacture oleomargarine shall be exempted from this license. Whenever any person, firm or corporation by himself, his or its

servant or agent, or as the agent or servant of another, conducts such sale or exchange in more than one place of business, a separate license shall be obtained for each place of business, and a separate fee shall be charged for such license. All wholesalers or jobbers handling oleomargarine shall conduct their business under regulations of cleanliness, sanitation and refrigeration prescribed by the commissioner of agriculture.

History: En. Sec. 15, Ch. 138, L. 1949.

agriculture" for "commissioner of agriculture, labor and industry" in this section.

Compiler's Note

The compiler has, pursuant to section 3-101.1, substituted "department of agriculture" for "department of agriculture, labor and industry" and "commissioner of

Collateral References

Food \$\infty\$ 3, 8. 36A C.J.S. Food \$\infty\$ 6 (4), 12 (1), 18.

27-516. Manufacturer's license. It shall be unlawful for any person, firm or corporation to operate or carry on the manufacture of oleomargarine within the state of Montana without first securing a license from the department of agriculture, which license shall expire on the 31st day of December of the year in which it is issued. The following schedule of license fees shall be charged by the department for all licenses issued under this section:

Plants or factories manufacturing one hundred thousand pounds (100,000 lbs.) or less of oleomargarine a year, twenty dollars (\$20.00). An addition of five dollars (\$5.00) shall be made to the fee for any such license for each one hundred thousand pounds (100,000 lbs.) or any fraction thereof annually produced in excess of the first one hundred thousand pounds (100,000 lbs.).

For the first year, or portion thereof before December 31, during which such plant or factory is in operation, the license fee shall be twenty dollars (\$20.00). Thereafter, the total year's production of the applicant for a year immediately preceding the application for a license shall determine the amount of any license required by this section.

History: En. Sec. 16, Ch. 138, L. 1949.

culture" for "department of agriculture, labor and industry" in this section.

Compiler's Note

Food 8. 36A C.J.S. Food § 6 (4).

The compiler has, pursuant to section 3-101.1, substituted "department of agri-

27-517. Revocation of licenses. All licenses issued by the department under this act, including wholesale and manufacturer's licenses, may be revoked by the commissioner of agriculture of the state whenever the holder of such license shall fail to comply with the laws of the state of Montana relative to the conducting of his place of business under such license, or whenever he shall fail to conduct said establishment in an orderly or sanitary manner. A licensee, upon revocation of his license, shall have the right of appeal to the district court from the order of revocation of the commissioner of agriculture, upon filing a written notice of appeal with the commissioner of agriculture within ten (10) days after service of the order of revocation upon said licensee. Upon appeal, the district court shall hear the matter de novo. If any person whose license has been so revoked by the commissioner shall thereafter continue to conduct or carry on said place of

business without a license, he shall be deemed guilty of a misdemeanor and shall be subject to the penalties in this act hereinafter provided.

History: En. Sec. 17, Ch. 138, L. 1949.

Cross-Reference

Compiler's Note

The compiler has, pursuant to section 3-101.1, substituted "commissioner of agriculture" for "commissioner of agriculture, labor and industry" in this section.

Application of Montana Rules of Civil Procedure to this section, see M. R. Civ. P., Rule 81(a), Table A.

27-518. Penalty. Any person, firm or corporation who either directly or indirectly, or by his or its servant, agent or employee, shall violate any of the provisions of this act, shall be deemed guilty of a misdemeanor, and where no specific penalty is provided, shall be punished by a fine of not more than two hundred dollars (\$200.00) or by imprisonment in the county jail for not more than sixty (60) days, or by both fine and imprisonment.

History: En. Sec. 18, Ch. 138, L. 1949.

27-519. Power of commissioner of agriculture to promulgate rules and regulations. The commissioner of agriculture shall have power, and it shall be his duty, to promulgate all reasonable rules and regulations in aid of and consistent with this act. Such rules and regulations, immediately upon publication, shall have the force and effect of law, and violation of any of such rules and regulations shall constitute a misdemeanor, punishable as provided in section 27-518.

History: En. Sec. 19, Ch. 138, L. 1949.

Compiler's Note

3-101.1, substituted "commissioner of agriculture" for "commissioner of agriculture, labor and industry" in this section.

The compiler has, pursuant to section

27-520. Construction—articles excepted. Nothing herein shall be construed as applying to or including peanut butter, salad dressings, mayonnaise products, pharmaceutical preparations, oil meals, cleansing and flavoring compounds, liquid preservative and illuminating oils.

History: En. Sec. 20, Ch. 138, L. 1949.

27-521. Serving of yellow oleomargarine in public eating places regulated. No person shall possess in a form ready for serving yellow oleomargarine at a public eating place unless a notice that oleomargarine is served is displayed prominently and conspicuously in such place and in such manner as to render it likely to be read and understood by the ordinary individual being served in such eating place or is printed or is otherwise set forth on the menu in type or lettering not smaller than that normally used to designate the serving of other food items. No person shall serve yellow oleomargarine at a public eating place, whether or not any charge is made therefor, unless (1) each separate serving bears or is accompanied by a labeling identifying it as oleomargarine, or (2) each separate serving thereof is triangular in shape.

History: En. Sec. 3, Ch. 99, L. 1953.

27-522. Advertising of oleomargarine regulated. No person shall, in any advertising of oleomargarine, make any representation or suggestion by statement, word, grade designation, design, device, symbol, sound, or

any combination thereof, that such oleomargarine is a dairy product, except that nothing herein contained shall prohibit any person from describing any or all of the ingredients used in the manufacture of oleomargarine.

History: En. Sec. 4, Ch. 99, L. 1953.

27-523. Penalty. Any person, firm, or corporation who, either directly or indirectly, or by his or its servant, agent, or employee, shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than three hundred dollars (\$300.00) or by imprisonment in the county jail for not more than ninety (90) days, or by both such fine and imprisonment.

History: En. Sec. 7, Ch. 99, L. 1953.

CHAPTER 6

FOOD SERVICE ESTABLISHMENTS, MARKETS AND MANUFACTURERS

Section 27-601 to 27-610. Repealed.

27-611. Regulation required to protect health.

27-612. Definition of terms.

27-613. Licenses required—limited to premises—publicly owned establishments exempt—right to license.

27-614. Application for license—fee.

27-615. Denial or cancellation of license—partial cancellation.

- 27-616. Notice of denial or cancellation of license-demand for hearing.
- 27-617. Corrective plan submitted to department—compliance bars prosecution.

27-618. Appeal from board to district court. 27-619. Diseased person not to handle food.

27-620. Rules adopted by board—agreements with other agencies.

27-621. Inspections and reports by health officers and sanitarians.

27-622. Liability of frozen food plant operators restricted.

27-623. Plant operator's lien for rental on compartments. 27-624. Game and beef carcasses stored in frozen food compartments—dec-

larations required of owner. 27-625. Violation as misdemeanor—penalties.

27-601 to 27-610. Repealed—Chapter 17, Laws of 1967.

conditions and practices which endanger public health.

Reneal

ments, were repealed by Sec. 16, Ch. 17, Laws 1967, effective January 1, 1968.

27-611. Regulation required to protect health. Regulation of establishments defined in section 27-612 is required to prevent and eliminate

History: En. Sec. 1, Ch. 17, L. 1967.

These sections (Secs. 1 to 10, Ch. 122, L. 1965), relating to food service establish-

36A C.J.S. Food § 12 (1); 39 C.J.S. Health §§ 25, 29.

Collateral References

Food 3: Health 31.

- 27-612. Definition of terms. As used in this act, unless the context clearly indicates otherwise:
- (1) "Food" means any edible substance, beverage, or ingredient used, intended for use, or for sale for human consumption.
- (2) "Food manufacturing establishment" means a commercial establishment, and all buildings or structures in connection with, used to manufacture or prepare food for sale or human consumption, but does not include

milk producers' facilities, milk pasteurization facilities, milk product manufacturing plants, slaughterhouses or meat packing plants.

(3) "Meat market" means a commercial establishment, and all buildings or structures in connection with, used to process, store, or display meat

or meat products for sale to the public or for human consumption.

- (4) "Food service establishment" means any fixed or mobile restaurant, coffee shop, cafeteria, short-order cafe, luncheonette, grille, tearoom, sandwich shop, soda fountain, food store serving food or beverage samples, food or drink vending machine, tavern, bar, cocktail lounge, night club, industrial feeding establishment, catering kitchen, commissary, private organization routinely serving the public, or similar place where food or drink is prepared, served, or provided to the public with or without charge. The term does not include establishments, vendors, or vending machines which sell or serve only packaged nonperishable foods in their unbroken original containers, or a private organization serving food only to its members.
- (5) "Frozen food plant" means a place used to freeze, process, or store food including facilities used in conjunction with the frozen food plant and a place where individual compartments are offered to the public on a rental or other basis.
- (6) "Person" means a person, partnership, corporation, association, co-operative group, or other entity engaged in operating, owning, or offering services of a food manufacturing establishment, meat market, food service establishment, or frozen food plant.
- (7) "Establishment" means a food manufacturing establishment, meat market, food service establishment, frozen food plant or commercial food processor.
 - (8) "State board" means the state board of health.
 - (9) "Department" means the state department of health.
- (10) "Executive officer" means the director of the state department of health.

History: En. Sec. 2, Ch. 17, L. 1967.

- 27-613. Licenses required—limited to premises—publicly owned establishments exempt—right to license. (1) A person operating an establishment shall procure an annual license from the department.
- (2) A separate license is required for each establishment, but if more than one (1) type of establishment is operated on the same premises and under the same management, only one (1) license is required.
- (3) Only one (1) license is required for a person owning and operating one (1) or more vending machines.
- (4) Licenses expire on December 31 following the date of issue unless canceled for cause.
- (5) Licenses are not transferable nor applicable to any premises other than that for which the license was issued.
- (6) Establishments owned or operated by the state, or a political subdivision of the state, are exempt from licensure but must comply with the requirements of this chapter and rules adopted by the state board under this chapter.

(7) Licenses shall be granted as a matter of right unless grounds for denial or cancellation exist.

History: En. Sec. 3, Ch. 17, L. 1967.

Cities may license soft drink parlors, secs. 11-918, 11-987.

Cross-References

Carrying on business without license, penalty, sec. 94-1511.

DECISIONS UNDER FORMER LAW

Failure To Produce License as a Defense Offered evidence to show that plaintiff did not have the license required by former section 27-111 authorizing him to conduct his restaurant business, at the time he was evicted by his landlord before expiration of the lease, was immaterial, since the fact alone would not tend to prove that he could not have procured one upon placing the premises in a sanitary condition. Quong v. McEvoy, 70 M 99, 105, 224 P 266.

- 27-614. Application for license—fee. (1) An application for a license is made to the department on forms, and contains information, required by the department.
- (2) For each license issued, the department shall collect a fee of five dollars (\$5). It shall deposit receipts in the state general fund.

History: En. Sec. 4, Ch. 17, L. 1967.

- 27-615. Denial or cancellation of license—partial cancellation. (1) The executive officer may deny or cancel a license if provisions of this act or rules adopted by the state board under this act are violated.
- (2) A license for a multiple-type establishment authorized by section 27-613 (2) may be denied or canceled in whole or in part as determined by the executive officer.
- (3) If a license for multiple-type establishment is canceled in part, the license shall be returned to the department for destruction and a new license shall be issued for that part of the establishment which may still be operated.

History: En. Sec. 5, Ch. 17, L. 1967.

27-616. Notice of denial or cancellation of license—demand for hearing. If an application is denied, or a license canceled, the executive officer shall notify the applicant or licensee in writing of the ground for the action. If the applicant or licensee desires a hearing to show cause why the action should not be taken, he shall notify the executive officer before the sixth day after notice of the action has been received.

History: En. Sec. 6, Ch. 17, L. 1967.

27-617. Corrective plan submitted to department—compliance bars prosecution. If a licensee is notified of a violation in writing by the department, he may submit a plan for correction of the condition before the eleventh day after receipt of the notice. If approved by the department, compliance with the proposed plan of correction within the time prescribed by the department is a bar to prosecution for violation.

History: En. Sec. 7, Ch. 17, L. 1967.

27-618. Appeal from board to district court. Before the eleventh day following a hearing held under section 27-616, an applicant or licensee may appeal the decision of the state board to the district court.

History: En. Sec. 8, Ch. 17, L. 1967.

27-619. Diseased person not to handle food. A person who has a communicable disease may not work in any establishment, nor in the handling or processing of food.

History: En. Sec. 9, Ch. 17, L. 1967.

27-620. Rules adopted by board—agreements with other agencies. To protect public health the state board may adopt rules relating to the operation of establishments defined in section 27-612, including coverage of food, personnel, food equipment and utensils, sanitary facilities and controls, construction and fixtures, and housekeeping. The state board may enter into co-operative agreements with other state agencies and political subdivisions of the state to carry out the provisions of this act.

History: En. Sec. 10, Ch. 17, L. 1967.

Collateral References Food © 2. 36A C.J.S. Food § 10 (1).

- 27-621. Inspections and reports by health officers and sanitarians. (1) State and local health officers, sanitarians or other authorized persons shall make investigations and inspections of establishments and make reports to the department as required by rules adopted by the state board.
- (2) State and local health officers, sanitarians, and other authorized persons shall have free access to establishments at all reasonable hours.
 - (3) Persons licensed under section 27-613 shall furnish food samples for

analysis as required by rules adopted by the state board.

(4) If a state or local health officer, sanitarian, or other authorized person finds food that is capable of causing food-borne illness, he shall issue a report in writing recommending that the food be withheld from sale to the public. A duplicate copy of the report, properly authenticated, is admissible in evidence in any action or proceeding where the condition of the food at the time of the inspection is material.

History: En. Sec. 11, Ch. 17, L. 1967.

27-622. Liability of frozen food plant operators restricted. The liability for loss of food by the owner or operator of a frozen food plant, which offers individual compartments to the public, is limited to negligence in operation or negligence of his employees.

History: En. Sec. 12, Ch. 17, L. 1967.

27-623. Plant operator's lien for rental on compartments. A person who operates a frozen food plant which offers individual compartments to the public has a lien on the property in his possession for rentals or other charges due. Liens may be foreclosed in the same way provided for chattel mortgages.

History: En. Sec. 13, Ch. 17, L. 1967.

27-624. Game and beef carcasses stored in frozen food compartments—declarations required of owner. (1) A person who owns or operates a frozen food plant which offers individual compartments to the public, is not responsible for violation of game laws by persons who rent locker space from him. However, the owner or operator of an establishment as defined in this act shall not receive the carcass of a game animal, game bird or any quarter, half or whole carcass of beef or yeal unless:

- (a) it is properly stamped or tagged; or
- (b) a written declaration is filed by the owner stating how it was obtained, date placed in the locker, and weight and type of meat.
- A declaration made under subsection (1) (b) of this section shall be retained for one (1) year and shall be open to inspection by employees of the department.

History: En. Sec. 14, Ch. 17, L. 1967.

- 27-625. Violation as misdemeanor—penalties. A person who violates provisions of this act or rules adopted by the state board under this act, is guilty of a misdemeanor. Upon conviction, he shall be:
- (1) fined not less than fifty dollars (\$50) nor more than one hundred dollars (\$100) for the first offense;
- (2) fined not less than seventy-five dollars (\$75) nor more than two hundred dollars (\$200) for the second offense:
- fined not less than two hundred dollars (\$200) and imprisoned in the county jail for not more than ninety (90) days for the third and subsequent offenses.

History: En. Sec. 15, Ch. 17, L. 1967.

Citation of act.

Section 27-701.

CHAPTER 7

FOOD, DRUG AND COSMETIC ACT

27-702. Definition of terms. 27-703. Prohibited acts enumerated. 27-704. Injunction to restrain prohibited acts. Criminal penalties for prohibited acts—reliance on guaranty or undertaking as defense—advertising media exempt. 27-705. 27-706. Detention or embargo of adulterated or misbranded articles-condemnation proceedings-immediate abatement of nuisances. 27-707. Proceedings to be instituted and prosecuted without delay-defendant's right to be heard by department. Minor violations need not be prosecuted. 27-708. 27-709. Regulations establishing food standards-conformity to Federal Act. 27-710. Adulterated food defined.

27-711. Misbranded food defined.
27-712. Permits for manufacture, processing and packing of foods—suspension and reinstatement—access to premises.

The regulations—adoption, amendment and re-

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27-714. Adulterated drug or device defined. 27-715. Misbranded drug or device defined.

Dispensing of prescription drugs—exemption from misbranding provisions—labeling required—removal of drugs from list. 27-716.

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27-718. Adulterated cosmetic defined. 27-719. Misbranded cosmetic defined.

samples.

False advertising-representation of curative properties deemed 27-720. false advertising.

27-721. Procedure for adopting, amending or repealing regulations-hearings. Department's access to buildings and premises-examination of 27-722.

27-723. Dissemination of information by department.

27-724. Hallucinogenic drugs—prohibitions.

27-725. Penalties for violations relating to hallucinogenic drugs.

27-701. Citation of act. This act may be cited as the Montana Food, Drug and Cosmetic Act.

History: En. Sec. 1, Ch. 307, L. 1967.

Collateral References

Adulteration©=1-13; Druggists©=5-12; Food©=½-26; Poisons©=1-9.

2 C.J.S. Adulteration §§ 1-20; 28 C.J.S. Druggists § 13; 36A C.J.S. Food §§ 3-56; 72 C.J.S. Poisons §§ 2-8.
25 Am. Jur. 2d, Drugs, Narcotics, and Poisons, pp. 284, 313, §§ 1-9, 40-48; 22 Am. Jur., Food, p. 805, §§ 3-41.

Constitutionality of regulations as to

milk. 18 ALR 235; 42 ALR 556; 58 ALR 672; 80 ALR 1225; 101 ALR 64; 110 ALR 644; 119 ALR 243 and 155 ALR

Constitutionality of provisions relative to oleomargarine. 53 ALR 474.

Statutes or ordinances in relation to confectionery. 58 ALR 293.

Validity of statutes or ordinances re-

lating to ice cream or other frozen milk products. 111 ALR 112.

Construction and application of regulations as to milk. 122 ALR 1062.

DECISIONS UNDER FORMER LAW

Pleading of Statute

It is not necessary for a plaintiff to refer to the Pure Food and Drug Act in order to recover damages for injuries arising from a violation of it. The courts

take judicial notice of the general and public domestic statutes, and they need not be specially pleaded. Kelley v. John R. Daily Co., 56 M 63, 72, 181 P 326.

Definition of terms. For the purpose of this act—

- The term "state board" means the Montana state board of health.
- The term "department" means the Montana state department of (b) health.
- The term "person" includes individual, partnership, corporation (c) and association.
 - The term "food" means (d)
 - articles used for food or drink for man or other animals, (1)
 - (2)chewing gum, and
 - articles used for components of any such article. (3)
 - The term "drug" means (e)
- articles recognized in the official United States Pharmacopoeia, (1)official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and
- (2) articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals; and
- articles (other than food) intended to affect the structure or any function of the body of man or other animals; and
- articles intended for use as a component of any article specified in clause (1), (2) or (3); but does not include devices or their components, parts or accessories.
- The term "device" (except when used in paragraph (1) of this section and in sections 27-703 (j), 27-711 (f), 27-715 (c) and (o) and 27-719 (c)) means instruments, apparatus and contrivances, including their components, parts and accessories, intended
- (1) for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals: or
- (2) to affect the structure or any function of the body of man or other animals.
 - (g) The term "cosmetic" means

(1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance, and

(2) articles intended for use as a component of any such articles, except

that such term shall not include soap.

(h) The term "official compendium" means the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States,

official National Formulary, or any supplement to any of them.

- (i) The term "label" means a display of written, printed or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this act that any word, statement or other information appearing on the label shall not be considered to be complied with unless such word, statement or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.
 - (j) The term "immediate container" does not include package liners.
- (k) The term "labeling" means all labels and other written, printed or graphic matter
 - (1) upon an article or any of its containers or wrappers, or

(2) accompanying such article.

(1) If an article is alleged to be misbranded because the labeling is misleading, or if an advertisement is alleged to be false because it is misleading, then in determining whether the labeling or advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound or in any combination thereof, but also the extent to which the labeling or advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling or advertisement relates under the conditions of use prescribed in the labeling or advertisement thereof or under such conditions of use as are customary or usual.

(m) The term "advertisement" means all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the pur-

chase of food, drugs, devices or cosmetics.

(n) The representation of a drug, in its labeling or advertisement, as an antiseptic shall be considered to be a representation that it is a germicide, except in the case of a drug purporting to be, or represented as, an antiseptic for inhibitory use as a wet dressing, ointment, dusting powder, or such other use as involves prolonged contact with the body.

(o) The term "new drug" means

(1) any drug the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended or suggested in the labeling thereof; or

(2) any drug the composition of which is such that such drug, as a result of investigations to determine its safety and effectiveness for use under such conditions, has become so recognized, but which has not, other-

wise than in such investigations, been used to a material extent or for a material time under such conditions.

- (p) The term "contaminated with filth" applies to any food, drug, device or cosmetic not securely protected from dust, dirt, and as far as may be necessary by all reasonable means, from all foreign or injurious contaminations.
- (q) The provisions of this act regarding the selling of food, drugs, devices or cosmetics, shall be considered to include the manufacture, production, processing, packing, exposure, offer, possession and holding of any such article for sale; and the sale, dispensing and giving of any such article, and the supplying or applying of any such articles in the conduct of any food, drug or cosmetic establishment.
- (r) The term "pesticide chemical" means any substance which, alone, in chemical combination, or in formulation with one or more other substances is an "economic poison" within the meaning of the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C., secs. 135-135k as now enacted or as hereafter amended), and which is used in the production, storage or transportation of raw agricultural commodities.
- (s) The term "raw agricultural commodity" means any food in its raw or natural state, including all fruits that are washed, colored or otherwise treated in their unpeeled natural form prior to marketing.
- (t) The term "food additive" means any substance, the intended use of which results or may be reasonably expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food, (including any substance intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting or holding food; and including any source of radiation intended for any such use), if such substance is not generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been adequately shown through scientific procedures (or, in the case of a substance used in a food prior to January 1, 1958 through either scientific procedures or experience based on common use in food) to be safe under the conditions of its intended use; except that such term does not include;
 - (1) a pesticide chemical in or on a raw agricultural commodity; or
- (2) a pesticide chemical to the extent that it is intended for use or is used in the production, storage or transportation of any raw agricultural commodity; or
 - (3) a color additive; or
- (4) any substance used in accordance with a sanction or approval granted prior to the enactment of the Food Additives Amendment of 1958, pursuant to the Federal Act; the Poultry Products Inspection Act (21 U.S.C. 451 and the following) or the Meat Inspection Act of March 4, 1907 (34 Stat. 1260), as amended and extended (21 U.S.C. 71 and the following).
 - (u) [Color and color additive]
 - (1) The term "color additive" means a material which-
 - (A) is a dye, pigment or other substance made by a process of synthesis or similar artifice, or extracted, isolated or otherwise derived,

with or without intermediate or final change of identity from a vegetable, animal, mineral or other source, or

- (B) when added or applied to a food, drug or cosmetic, or to the human body or any part thereof, is capable (alone or through reaction with other substance) of imparting color thereto; except that such term does not include any material which has been or hereafter is exempted under the Federal Act.
- (2) The term "color" includes black, white and intermediate grays.
- (3) Nothing in clause (1) of this subsection (u) shall be construed to apply to any pesticide chemical, soil or plant nutrient, or other agricultural chemical solely because of its effect in aiding, retarding or otherwise affecting, directly or indirectly the growth or other natural physiological process of produce of the soil and thereby affecting its color, whether before or after harvest.
- (v) The term "Federal Act" means the Federal Food, Drug and Cosmetic Act, as amended (Title 21 U.S.C. 301 et seq.).

History: En. Sec. 2, Ch. 307, L. 1967.

Collateral References

What is "food" within meaning of statute. 17 ALR 1282.

27-703. Prohibited acts enumerated. The following acts and the causing thereof within the state of Montana are hereby prohibited:

(a) The manufacture, sale or delivery, holding or offering for sale of any food, drug, device or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device or cosmetic.

- (c) The receipt in commerce of any food, drug, device or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.
- (d) The sale, delivery for sale, holding for sale or offering for sale of any article in violation of section 27-712 or 27-717.
 - (e) The dissemination of any false advertisement.
- (f) The refusal to permit entry or inspection or to permit the taking of a sample, as authorized by section 27-722.
- (g) The giving of a guaranty or undertaking which guaranty or undertaking is false, except by a person who relied on a guaranty or undertaking to the same affect [effect] signed by, and containing the name and address of the person residing in the state of Montana from whom he received in good faith the food, drug, device or cosmetic.
- (h) The removal or disposal of a detained or embargoed article in violation of section 27-706.
- (i) The alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food, drug, device or cosmetic, if such act is done while such article is held for sale and results in such article being adulterated or misbranded.
- (j) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp, tag, label or other identification device authorized or required by regulations promulgated under the provisions of this act or of the Federal Act.

- (k) The using, on the labeling of any drug or in any advertisement relating to such drug, of any representation or suggestion that an application with respect to such drug is effective under section 27-717, or that
- such drug complies with the provisions of such section.
- (1) In the case of a prescription drug distributed or offered for sale in this state, the failure of the manufacturer, packer or distributor thereof to maintain for transmittal, or to transmit, to any practitioner licensed by applicable law to administer such drug who makes written request for information as to such drug, true and correct copies of all printed matter which is required to be included in any package in which that drug is distributed or sold, or such other printed matter as is approved under the Federal Act. Nothing in this paragraph shall be construed to exempt any person from any labeling requirement imposed by or under other provisions of this act.
 - (m) [Counterfeiting trade-marks]

(1) Placing or causing to be placed upon any drug or device or container thereof, with intent to defraud, the trade name or other identifying mark, or imprint of another or any likeness of any of the foregoing; or

(2) Selling, dispensing, disposing of or causing to be sold, dispensed or disposed of or concealing or keeping in possession, control or custody, with intent to sell, dispense or dispose of, any drug, device or any container thereof, with knowledge that the trade name or other identifying mark or imprint of another or any likeness of any of the foregoing has been placed thereon in a manner prohibited by subsection (1) hereof; or

(3) Making, selling, disposing of or causing to be made, sold or disposed of or keeping in possession, control or custody, or concealing, with intent to defraud, any punch, die, plate or other thing designed to print, imprint, or reproduce that trade name or other identifying mark or imprint of another or any likeness of any of the foregoing upon any drug, device or container thereof.

(n) Dispensing or causing to be dispensed a different drug or brand of drug in place of the drug or brand of drug ordered or prescribed without the express permission in each case of the person ordering or prescrib-

ing.

(o) The using by any person to his own advantage, or revealing, other than to the state board, or officers or employees of the department, or to the courts when relevant in any judicial proceeding under this act, any information acquired under authority of this act concerning any method or process which as a trade secret is entitled to protection.

History: En. Sec. 3, Ch. 307, L. 1967.

Cross-References

Adulterated candies, sale, penalty, sec. 94-3503.

Adulteration forbidden, sec. 94-3502.

Adulteration of drugs, secs. 66-1524 to 66-1526.

Diseased animal carcasses, selling, penalty, sec. 94-35-173.

Diseased beef, sale forbidden, sec. 94-35-172.

Diseased cattle, selling meat from, penalty, sec. 94-35-194.

Poisoning, punishment, sec. 94-35-255. Sale of adulterated milk, prohibited, sec.

Spoiled foods, selling, penalty, sec. 94-

DECISIONS UNDER FORMER LAW

Civil Liability

Act arises from a violation of the statute, Liability under the Pure Food and Drug and it is immaterial whether the foundation of an action based upon such violation is laid in negligence or warranty. Kelley v. John R. Daily Co., 56 M 63, 72, 181

The Pure Food and Drug Act makes the seller the insurer of the purity of food products sold by him, and guilty knowledge of its impurity is not an ingredient of the offense charged. Bolitho v. Safeway Stores, Inc., 109 M 213, 216, 95 P 24 443.

Pleading Defendant's Duty

A complaint alleging that, at the time of the sale of impure food by defendant to plaintiff, defendant was engaged in selling at retail, to the public generally, meat and meat products for human consumption, was sufficient to bring the case within the statute, and disclose the duty defendant owed to the public, including plaintiff, to see that its food products offered for sale were not adulterated within the meaning of such statute. Kelley v. John R. Daily Co., 56 M 63, 72, 181 P 326.

27-704. Injunction to restrain prohibited acts. In addition to the remedies hereinafter provided the department is hereby authorized to apply to district court for, and such court shall have jurisdiction upon hearing and for cause shown, to grant a temporary or permanent injunction restraining any person from violating any provision of section 27-703; irrespective of whether or not there exists an adequate remedy at law.

History: En. Sec. 4, Ch. 307, L. 1967.

27-705. Criminal penalties for prohibited acts—reliance on guaranty or undertaking as defense—advertising media exempt. (a) Any person who violates any of the provisions of section 27-703 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than three (3) months or a fine of not more than two hundred fifty dollars (\$250) or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final, such person shall be subject to imprisonment for not more than six (6) months, or of a fine of not more than five hundred dollars (\$500) or both such imprisonment and fine.

(b) No person shall be subject to the penalties of subsection (a) of this section, for having violated section 27-703 (a) or (c) if he establishes a guaranty or undertaking signed by and containing the name and address of the person residing in the state of Montana from whom he received in good faith the article, to the effect that such article is not adulterated or misbranded within the meaning of this act, designating this act.

(c) No publisher, radio-broadcast licensee, or agency or medium for the dissemination of an advertisement, except the manufacturer, packer, distributor or seller of the article to which a false advertisement relates, shall be liable under this section by reason of the dissemination by him of such false advertisement, unless he has refused, on the request of the department to furnish the department the name and post-office address of the manufacturer, packer, distributor, seller or advertising agency, residing in

the state of Montana who causes him to disseminate such advertisement.

History: En. Sec. 5, Ch. 307, L. 1967.

Collateral References

Penal offense predicated upon violation

of food law as affected by ignorance or mistake of fact, lack of criminal intent, or presence of good faith. 152 ALR 798.

DECISIONS UNDER FORMER LAW

Knowledge of Impurity

The seller of food products is made insurer of their purity, and guilty knowledge on his part is not an ingredient of the offense prohibited; the obligation is personal, and cannot be avoided by showing that the impure food was purchased from a foreign concern and bore the stamp of approval by the government inspectors. Kelley v. John R. Daily Co., 56 M 63, 72, 181 P 326.

Reliance on Guarantv

Former section 27-110 was not open to the construction that the presence of a guaranty executed by the wholesaler, jobber or manufacturer as to the purity of an article of food sold in the original, unbroken package and found adulterated, is a defense to an action against the dealer for damages resulting from illness caused by eating the food, and did not relieve him from civil liability under section 74-321 (since repealed). Bolitho v. Safeway Stores, Inc., 109 M 213, 219, 95 P 2d 443.

- 27-706. Detention or embargo of adulterated or misbranded articles condemnation proceedings—immediate abatement of nuisances. ever a duly authorized agent of the department finds or has probable cause to believe that any food, drug, device or cosmetic is adulterated, or so misbranded as to be dangerous or fraudulent within the meaning of this act, he shall affix to such article a tag or other appropriate marking, giving notice that such article is, or is suspected of being, adulterated or misbranded and has been detained or embargoed and warning all persons not to remove or dispose of such article by sale or otherwise until permission for removal or disposal is given by such agent or the court. It shall be unlawful for any person to remove or dispose of such detained or embargoed article by sale or otherwise without such permission.
- When an article detained or embargoed under subsection (a) has been found by such agent to be adulterated or misbranded, he shall petition the justice of peace, police judge or district court in whose jurisdiction the article is detained or embargoed for a libel for condemnation of such article. When such agent has found that an article so detained or embargoed is not adulterated or misbranded, he shall remove the tag or other marking.
- (c) If the court finds that a detained or embargoed article is adulterated or misbranded, such article shall after entry of the decree be destroyed at the expense of the claimant thereof, under the supervision of such agent, and all court costs and fees and storage and other proper expenses shall be taxed against the claimant of such article or his agent; provided, that when the adulteration or misbranding can be corrected by proper labeling or processing of the article, the court, after entry of the decree and after such costs, fees and expenses have been paid and a good and sufficient bond, conditioned that such article shall be so labeled or processed, has been executed, may by order direct that such article be delivered to the claimant thereof for such labeling or processing under the supervision of an agent of the department. The expense of such supervision shall be paid by claimant. Such shall be returned to the claimant of the article on the representation to the court by the department that the article is no longer in violation of this act, and that the expenses of such supervision have been paid.
- Whenever the department or any of its authorized agents shall find in any room, building, vehicle of transportation or other structure, any meat, sea food, poultry, vegetable, fruit or other perishable articles which are unsound, or contain any filthy, decomposed or putrid substance, or that may be poisonous or deleterious to health or otherwise unsafe, the same being hereby declared to be a nuisance, the department or its authorized agent, shall forthwith condemn or destroy the same or in any other manner

render the same unsalable as human food.

History: En. Sec. 6, Ch. 307, L. 1967.

27-707. Proceedings to be instituted and prosecuted without delay—defendant's right to be heard by department. It shall be the duty of each state attorney or county attorney, to whom the department reports any violation of this act, to cause appropriate proceedings to be instituted in the proper courts without delay and to be prosecuted in the manner required by law. Before any violation of this act is reported to any such attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views before the department or its designated agent, either orally or in writing, in person or by attorney, with regard to such contemplated proceeding.

History: En. Sec. 7, Ch. 307, L. 1967.

27-708. Minor violations need not be prosecuted. Nothing in this act shall be construed as requiring the department to report for the institution of proceedings under this act, minor violations of this act, whenever the department believes that the public interest will be adequately served in the circumstances by a suitable written notice of warning.

History: En. Sec. 8, Ch. 307, L. 1967.

27-709. Regulations establishing food standards—conformity to Federal Act. Whenever in the judgment of the state board such action will promote honesty and fair dealing in the interest of consumers, the state board shall promulgate regulations fixing and establishing for any food or class of food a reasonable definition and standard of identity, and/or reasonable standard of quality and/or fill of container. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the state board shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. The definitions and standards so promulgated shall conform so far as practicable to the definitions and standards promulgated under authority of the Federal Act or the state board may promulgate by reference the definitions and standards promulgated under authority of the Federal Act.

History: En. Sec. 9, Ch. 307, L. 1967.

Collateral References

Validity of regulations as to the ingredients of nonalcoholic drinks. 41 ALR 930.

DECISIONS UNDER FORMER LAW

Pleading of Conformity to Federal Act
An allegation in the answer of a dealer

An allegation in the answer of a dealer in foodstuffs in unbroken packages, in an action for damages resultant from consumption of an unwholesome and deleterious article, that the food sold conformed to the rules and regulations of Congress under the national pure food acts,

and therefore could not be deemed adulterated or objectionable, was a conclusion of the pleader, in the absence of a statement of facts from which it could be determined that the government would permit the sale of the article in the condition it was, when sold. Bolitho v. Safeway Stores, Inc., 109 M 213, 219, 95 P 2d 443.

27-710. Adulterated food defined. A food shall be deemed to be adulterated—

(a) [Poisonous and deleterious contents]

(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in ease the substance is not an added

substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or

(2) [Unsafe additives]

- (A) if it bears or contains any added poisonous or added deleterious substance, other than one which is
 - (i) a pesticide chemical in or on a raw agricultural commodity;

(ii) a food additive; or

- (iii) a color additive, which is unsafe within the meaning of section 27-713 (a); or
- (B) if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 408 (a) of the Federal Act as amended or
- (C) if it is or it bears or contains any food additive which is unsafe within the meaning of section 409 of the Federal Act as amended; provided, that where a pesticide chemical has been used in or on a raw agricultural commodity in conformity with an exemption granted or tolerance prescribed under section 408 of the Federal Act, and such raw agricultural commodity has been subjected to processing such as canning, cooking, freezing, dehydrating or milling, the residue of such pesticide chemical remaining in or on such processed food shall, notwithstanding the provisions of section 27-713 and clause (C) of this section, not be deemed unsafe if such residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice, and the concentration of such residue in the processed food when ready-to-eat, is not greater than the tolerance prescribed for the raw agricultural commodity; or
- (3) if it consists in whole or in part of a diseased, contaminated, filthy, putrid or decomposed substance, or if it is otherwise unfit for food; or
- (4) if it has been produced, prepared, packed or held under insanitary conditions, whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health; or
- (5) if it is the product of a diseased animal or an animal which has died otherwise than by slaughter, or that has been fed upon the uncooked offal from a slaughterhouse; or
- (6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

(b) [Omissions, substitutions, and deceptions.]

- (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or
- (2) If any substance has been substituted wholly or in part therefor; or
 - (3) If damage or inferiority has been concealed in any manner; or
- (4) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is.
- (c) If it is confectionery and it bears or contains any alcohol or non-nutritive article or substance except harmless coloring, harmless flavoring,

harmless resinous glaze not in excess of four-tenths of 1 per centum, harmless natural wax not in excess of four-tenths of 1 per centum, harmless natural gum and pectin; provided, that this paragraph shall not apply to any confectionery by reason of its containing less than one-half of 1 per centum by volume of alcohol derived solely from the use of flavoring extracts, or to any chewing gum by reason of its containing harmless nonnutritive masticatory substances.

(d) If it is or bears or contains any color additive which is unsafe within the meaning of the Federal Act.

History: En. Sec. 10, Ch. 307, L. 1967.

Collateral References

Preservative as adulterant within statute in relation to food. 50 ALR 76.

Statutory provisions relating to purity of food products as applicable to foreign substances which get into product as result

of accident or negligence, and not by purpose or design. 98 ALR 1496.

Constitutionality of statutes, ordinances, or other regulations against adulteration of food products as applied to substances used for preservative purposes. 114 ALR 1214.

Coloring matter as forbidden adulteration of food, 56 ALR 2d 1129.

DECISIONS UNDER FORMER LAW

Abstracting of Components

Where pellets which were used for sheep feed were manufactured from screenings from the harvest of wheat by cooking and crushing the seeds, extracting the oils therefrom and pressing the residue into pellets, it was error to give an instruction as to abstracting of valuable components, since the oil was removed from the seeds but nothing was removed from the pellets which was the product sold. Seaton Ranch Co. v. Montana Vegetable Oil & Feed Co., 123 M 396, 217 P 2d 549, 551.

Pleading of Adulteration

A charge in a complaint that defendant sold and delivered to plaintiff's husband, for immediate use in his family, including plaintiff, adulterated meat containing "diseased, infected, putrid, decomposed, poisonous acid and animal matter," sufficiently charged defendant with a violation of the Pure Food and Drug Act, and with a breach of duty constituting legal negligence. Kelley v. John R. Daily Co., 56 M 63, 72, 181 P 326.

27-711. Misbranded food defined. A food shall be deemed to be misbranded—

- (a) If its labeling is false or misleading in any particular.
- (b) If it is offered for sale under the name of another food.
- (c) If it is an imitation of another food for which a definition and standard of identity has been prescribed by regulations as provided by section 27-709; or if it is an imitation of another food that is not subject to subsection (g) of this section, unless its label bears in type of uniform size and prominence, the word imitation, and, immediately thereafter, the name of the food imitated.
 - (d) If its container is so made, formed or filled as to be misleading.
 - (e) If in package form, unless it bears a label containing
- (1) the name and place of business of the manufacturer, packer or distributor:
- (2) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; provided, that under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the state board.

- (f) If any word, statement or other information required by or under authority of this act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs or devices in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.
- (g) If it purports to be, or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 27-709, unless

(1) it conforms to such definition and standard, and

- (2) its label bears the name of the food specified in the definition and standard, and, in so far as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring and coloring) present in such food.
 - (h) If it purports to be or is represented as—
- (1) a food for which a standard of quality has been prescribed by regulations as provided by section 27-709 and its quality falls below such standard unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard; or
- (2) a food for which a standard or standards of fill of container have been prescribed by regulation as provided by section 27-709, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard.
- (i) If it is not subject to the provisions of paragraph (g) of this section unless it bears labeling clearly giving
 - (1) the common or usual name of the food, if any there be, and
- (2) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings and colorings, other than those sold as such, may be designated as spices, flavorings and colorings without naming each; provided, that to the extent that compliance with the requirements of clause (2) of this paragraph is impractical or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the state board; and provided further that the requirements of clause (2) of this paragraph shall not apply to food products which are packaged at the direction of purchasers at retail at the time of sale, the ingredients of which are disclosed to the purchasers by other means in accordance with regulations promulgated by the state board.
- (j) If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral and other dietary properties as the state board determines to be, and by regulations prescribes as, necessary in order to fully inform purchasers as to its value for such uses.
- (k) If it bears or contains any artificial flavoring, artificial coloring or chemical preservative, unless it bears labeling stating that fact; provided, that the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the state board. Butter, cheese, ice cream and frozen

desserts as defined in sections 32-476 through 32-486 shall be exempt from label statements for artificial flavoring and artificial coloring.

- (l) If it is a product intended as an ingredient of another food and when used according to the directions of the purveyor will result in the final food product being adulterated or misbranded.
- (m) If it is a color additive unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive prescribed under the provisions of the Federal Act.

History: En. Sec. 11, Ch. 307, L. 1967.

Cross-References

Bottles and containers, measure regulations, secs. 90-140, 90-141.

Measurement of dairy products, secs. 3-2432, 3-2433.

Oleomargarine, stamping required, sec. 94-35-145.

Collateral References

Validity of statute or ordinance as to "containers." 5 ALR 1068 and 101 ALR

Validity of statute or ordinance requiring commodities to be sold in a specified quantity or weight. 6 ALR 429 and 90 ALR 1290.

Construction of statute or ordinance with respect to net weight or capacity of containers, 35 ALR 785.

Constitutionality of requirement of disclosure by label of materials or ingredients of articles sold or offered for sale. 57 ALR 686.

- 27-712. Permits for manufacture, processing and packing of foods suspension and reinstatement—access to premises. (a) Whenever the department finds after investigation that the distribution in Montana of any class of food may, by reason of contamination with microorganisms during manufacture, processing or packing thereof in any locality, be injurious to health, and that such injurious nature cannot be adequately determined after such articles have entered commerce, it then, and in such case only, shall promulgate regulations providing for the issuance to manufacturers, processors or packers of such class of food in such locality, of permits to which shall be attached such conditions governing the manufacture, processing or packing of such class of food for such temporary period of time, as may be necessary to protect the public health; and after the effective date of such regulations and during such temporary period, no person shall introduce or deliver for introduction into commerce any such food manufactured, processed or packed by any such manufacturer, processor or packer unless such manufacturer, processor or packer holds a permit issued by the department as provided by such regulations.
- (b) The department is authorized to suspend immediately upon notice any permit issued under authority of this section if it is found that any of the conditions of the permit have been violated. The holder of a permit so suspended shall be privileged at any time to apply for the reinstatement of such permit, and the department shall, immediately after prompt hearing and inspection of the establishment, reinstate such permit if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit as originally issued or as amended.
- (c) Any officer or employee duly designated by the department shall have access to any factory or establishment, the operator of which holds a permit from the department for the purpose of ascertaining whether or not the conditions of the permit are being complied with, and denial of access for such inspection shall be ground for suspension of the permit until such access is freely given by the operator.

History: En. Sec. 12, Ch. 307, L. 1967. Collateral References grading, packing, or branding of farm products. 73 ALR 1445.

Constitutionality of statutes relating to

- 27-713. Additives to conform to regulations—adoption, amendment and repeal of regulations—factors considered. (a) Any added poisonous or deleterious substance, any food additive, any pesticide chemical in or on a raw agricultural commodity or any color additive shall, with respect to any particular use or intended use, be deemed unsafe for the purpose of application of clause (2) (A) of section 27-710 (a) with respect to any food, section 27-714 (a) with respect to any drug or device, or section 27-718 (a) with respect to any cosmetic, unless there is in effect a regulation pursuant to subsection (b) of this section limiting the quantity of such substance and the use or intended use of such substance conform to the terms prescribed by such regulation. While such regulation relating to such substance is in effect, a food, drug or cosmetic shall not, by reason of bearing or containing such substance in accordance with the regulation, be considered adulterated within the meaning of clause 1, section 27-710 (a), section 27-714 (a) or section 27-718 (a).
- (b) The state board, whenever public health or other considerations in the state so require, is authorized to adopt, amend or repeal regulations whether or not in accordance with regulations promulgated under the Federal Act prescribing therein tolerances for any added poisonous or deleterious substances for food additives, for pesticide chemicals in, or on, raw agricultural commodities or for color additives, including, but not limited to, zero tolerances and exemptions from tolerances, in the case of pesticide chemicals in or on raw agricultural commodities, and prescribing the conditions under which a food additive or a color additive may be safely used and exemptions where such food additive or color additive is to be used solely for investigational or experimental purposes, upon its own motion or upon the petition of any interested party requesting that such a regulation be established; and it shall be incumbent upon such petitioner to establish by data submitted to the state board that a necessity exists for such regulation and that its effect will not be detrimental to the public health. If the data furnished by the petitioner is not sufficient to allow the state board to determine whether such regulation should be promulgated, the state board may require additional data to be submitted and failure to comply with the request shall be sufficient grounds to deny the request. In adopting, amending or repealing regulations relating to such substances the state board shall consider among other relevant factors, the following which the petitioner, if any, shall furnish:
- (1) The name and all pertinent information concerning such substance including where available, its chemical identity and composition, a statement of the conditions of the proposed use, including directions, recommendations and suggestions and including specimens of proposed labeling, all relevant data bearing on the physical or other technical effect and the quantity required to produce such effect.
- (2) The probable composition of or other relevant exposure from the article and of any substance formed in or on a food, drug, or cosmetic resulting from the use of such substance.

- (3) The probable consumption of such substance in the diet of man and animals taking into account any chemically or pharmacologically related substance in such diet.
- (4) Safety factors which, in the opinion of experts qualified by scientific training and experience to evaluate the safety of such substances for the use or uses for which they are proposed to be used, are generally recognized as appropriate for the use of animal experimentation data.
- (5) The availability of any needed practicable methods of analysis for determining the identity and quantity of
 - (A) such substance in or on an article,
 - (B) any substance formed in or on such article because of the use of such substance, and
 - (C) the pure substance and all intermediates and impurities and,
- (6) Facts supporting a contention that the proposed use of such substance will serve a useful purpose.

History: En. Sec. 13, Ch. 307, L. 1967.

- 27-714. Adulterated drug or device defined. A drug or device shall be deemed to be adulterated—
 - (a) [Contaminated substances]
- (1) if it consists in whole or in part of any filthy, putrid or decomposed substance; or
 - (2) [Unsafe conditions of processing]
 - (A) if it has been produced, prepared, packed or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health; or
 - (B) if it is a drug and the methods used in, or the facilities or controls used for, its manufacture, processing, packing or holding do not conform to or are not operated or administered in conformity with current good manufacturing practice to assure that such drug meets the requirements of this act as to safety and has the identity and strength and meets the quality and purity characteristics, which it purports or is represented to possess, or
- (3) if it is a drug and its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or
 - (4) if
 - (A) it is a drug and it bears or contains, for purposes of coloring only, a color additive which is unsafe within the meaning of the Federal Act or
 - (B) it is a color additive, the intended use of which in or on drugs is for purposes of coloring only, and is unsafe within the meaning of the Federal Act.
- (b) If it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium. Such determination as to strength, quality or purity shall be made in ac-

cordance with the tests or methods of assay set forth in such compendium, or in the absence of or inadequacy of such tests or methods of assay, those prescribed under authority of the Federal Act. No drug defined in an official compendium shall be deemed to be adulterated under this paragraph because it differs from the standard of strength, quality or purity therefor set forth in such compendium, if its difference in strength, quality or purity from such standard is plainly stated on its label. Whenever a drug is recognized in both the United States Pharmacopoeia and the Homeopathic Pharmacopoeia of the United States it shall be subject to the requirements of the United States Pharmacopoeia unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the Homeopathic Pharmacopoeia of the United States and not to those of the United States Pharmacopoeia.

- (c) If it is not subject to the provisions of paragraph (b) of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess.
 - (d) If it is a drug and any substance has been
- mixed or packed therewith so as to reduce its quality or strength;
 - (2) substituted wholly or in part therefor. History: En. Sec. 14, Ch. 307, L. 1967.

27-715. Misbranded drug or device defined. A drug or device shall be deemed to be misbranded—

- (a) If its labeling is false or misleading in any particular.
- (b) If in package form unless it bears a label containing
- (1) the name and place of business of the manufacturer, packer or distributor; and
- (2) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; provided, that under clause (2) of this paragraph reasonable variation shall be permitted, and exemptions as to small packages shall be allowed, in accordance with regulations prescribed by the state board, or issued under the Federal Act.
- (c) If any word, statement or other information required by or under authority of this act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statement, designs or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.
- (d) If it is for use by man and contains any quantity of the narcotic or hypnotic substance alpha-eucaine, barbituric acid, beta-eucaine, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marihuana, morphine, opium, paraldehyde, peyote, or sulphonmethane or any chemical derivative of such substance, which derivative, after investigation, has been found to be and designated as habit forming, by regulations issued by the state board under this act, or by regulations issued pursuant to section 502 (d) of the Federal Act, unless its label bears the name and quantity or proportion of such substance or derivative and in juxtaposition therewith the statement "Warning—May be habit forming."

- (e) [Established name and active ingredients]
- (1) If it is a drug, unless its label bears, to the exclusion of any other nonproprietary name (except the applicable systematic chemical name or the chemical formula),
 - (A) the established name (as defined in subparagraph (2)) of the drug, if such there be; and
 - (B) in case it is fabricated from two or more ingredients, the established name and quantity of each active ingredient, including the kind and quantity or proportion of any alcohol, and also including, whether active or not, the established name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative or preparation of any such substances contained therein: provided that the requirement for stating the quantity of the active ingredients, other than the quantity of those specifically named in this paragraph, shall apply only to prescription drugs: provided further, that to the extent that compliance with the requirements of clause (B) of this subparagraph is impracticable, exemptions shall be allowed under regulations promulgated by the state board, or under the Federal Act.
- (2) As used in this paragraph (e), the term "established name," with respect to a drug or ingredient thereof, means
 - (A) the applicable official name designated pursuant to section 508 of the Federal Act, or
 - (B) if there is no such name and such drug, or such ingredient, is an article recognized in an official compendium, then the official title thereof in such compendium or
 - (C) if neither clause (A) nor clause (B) of this subparagraph applies, then the common or usual name if any, of such drug or of such ingredient: provided further, that where clause (B) of this subparagraph applies to an article recognized in the United States Pharmacopoeia and in the Homeopathic Pharmacopoeia under different official titles, the official title used in the United States Pharmacopoeia shall apply unless it is labeled and offered for sale as a homeopathic drug, in which case the official title used in the Homeopathic Pharmacopoeia shall apply.
 - (f) Unless its labeling bears
 - (1) adequate directions for use; and
- (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form as are necessary for the protection of users; provided, that where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the state board shall promulgate regulations exempting such drug or device from such requirements: provided further, that articles exempted under regulations issued under section 502 (f) of the Federal Act may also be exempt.

- (g) if it purports to be a drug the name of which is recognized in an official compendium, unless it is packaged and labeled as prescribed therein: provided, that the method of packing may be modified with the consent of the department, or if consent is obtained under the Federal Act. Whenever a drug is recognized in both the United States Pharmacopoeia and the Homeopathic Pharmacopoeia of the United States, it shall be subject to the requirement of the United States Pharmacopoeia with respect to packaging and labeling unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the Homeopathic Pharmacopoeia of the United States and not to those of the United States Pharmacopoeia: provided further, that in the event of inconsistency between the requirements of this paragraph and those of paragraph (e) as to the name by which the drug or its ingredients shall be designated, the requirements of paragraph (e) shall prevail.
- (h) If it has been found by the department or under the Federal Act to be a drug liable to deterioration, unless it is packaged in such form and manner, and its label bears a statement of such precautions, as the regulations issued by the state board or under the Federal Act require as necessary for the protection of public health. No such regulation shall be established for any drug recognized in an official compendium until the department shall have informed the appropriate body charged with the revision of such compendium of the need for such packaging or labeling requirements and such body shall have failed within a reasonable time to prescribe such requirements.
 - (i) [Misleading containers and imitations]
- (1) If it is a drug and its container is so made, formed, or filled as to be misleading; or
 - (2) If it is an imitation of another drug; or
 - (3) If it is offered for sale under the name of another drug.
- (j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended or suggested in the labeling thereof.
- (k) If it is, or purports to be, or is represented as a drug composed wholly or partly of insulin, unless
- (1) it is from a batch with respect to which a certificate or release has been issued pursuant to section 506 of the Federal Act, and
 - (2) such certificate or release is in effect with respect to such drug.
- (1) If it is, or purports to be, or is represented as a drug composed wholly or partly of any kind of penicillin, streptomycin, chloratetracycline, chloramphenicol, bacitracin, or any other antibiotic drug, or any derivative thereof, unless
- (1) it is from a batch with respect to which a certificate or release has been issued pursuant to section 507 of the Federal Act, and
- (2) such certificate or release is in effect with respect to such drug: provided, that this paragraph shall not apply to any drug or class of drugs exempted by regulations promulgated under section 507 (c) or (d) of the Federal Act. For the purpose of this subsection the term "antibiotic drug" means any drug intended for use by man containing any quantity of any chemical substance which is produced by a microorganism and which

has the capacity to inhibit or destroy microorganisms in dilute solution (including the chemically synthesized equivalent of any such substance).

- (m) If it is a color additive, the intended use of which in or on drugs is for the purpose of coloring only, unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive, prescribed under the provisions of section 27-713 (b) or of the Federal Act.
- (n) In the case of any prescription drug distributed or offered for sale in this state, unless the manufacturer, packer or distributor thereof includes in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer or distributor with respect to that drug a true statement of
- (1) the established name, as defined in section 27-715 (e) (2) of this act.
- (2) the formula showing quantitatively each ingredient of such drug to the extent required for labels under section 502 (e) of the Federal Act, and
- (3) such other information in brief summary relating to side effects, contraindications, and effectiveness as shall be required in regulations issued under the Federal Act.
- (o) If a trade-mark, trade name or other identifying mark, imprint or device or another or any likeness of the foregoing has been placed thereon or upon its container with intent to defraud.
- (p) Drugs and devices which are, in accordance with the practice of the trade, to be processed, labeled or repacked in substantial quantities at establishments other than those where originally processed or packed shall be exempt from any labeling or packaging requirements of this act, provided that such drugs and devices are being delivered, manufactured, processed, labeled, repacked or otherwise held in compliance with regulations issued by the state board, or under the Federal Act.

History: En. Sec. 15, Ch. 307, L. 1967.

- 27-716. Dispensing of prescription drugs—exemption from misbranding provisions—labeling required—removal of drugs from list. (a) A drug intended for use by man which—
 - 1) is a habit-forming drug to which section 27-715 (d) applies; or
- (2) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or
- (3) is limited by an approved application under section 505 of the Federal Act or section 27-717 of this act to use under the professional supervision of a practitioner licensed by law to administer such drug, shall be dispensed only
 - (A) upon a written prescription of a practitioner licensed by law to administer such drug, or
 - (B) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or

(C) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist.

The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in a drug being misbranded while held for sale.

- (b) Any drug dispensed by filling or refilling a written or oral prescription of a practitioner licensed by law to administer such drug shall be exempt from the requirements of section 27-715, except subsections (a), (i) (2) and (3), (k), and (1), and the packaging requirements of subsections (g) and (h), if the drug bears a label containing the name and address of the dispenser, the serial number and date of the prescription or of its filling, the name of the prescriber and, if stated in the prescription, the name of the patient and the directions for use and cautionary statements, if any, contained in such prescription. This exemption shall not apply to any drug dispensed in the course of the conduct of a business of dispensing drugs pursuant to diagnosis by mail, or to a drug dispensed in violation of paragraph (a) of this section.
- (c) The state board may by regulation remove drugs subject to section 27-715 (d) and section 27-717 from the requirements of paragraph (a) of this section when such requirements are not necessary for the protection of the public health. Drugs removed from the prescription requirements of the Federal Act by regulations issued thereunder may also, by regulations issued by the state board, be removed from the requirements of paragraph (a).
- (d) A drug which is subject to paragraph (a) of this section shall be deemed to be misbranded if at any time prior to dispensing its label fails to bear the statement "Caution: Federal Law Prohibits Dispensing Without Prescription", or "Caution: State Law Prohibits Dispensing Without Prescription". A drug to which paragraph (a) of this section does not apply shall be deemed to be misbranded if at any time prior to dispensing its label bears the caution statement quoted in the preceding sentence.
- (e) Nothing in this section shall be construed to relieve any person from any requirement prescribed by or under authority of law with respect to drugs now included or which may hereafter be included within the classifications of narcotic drugs or marihuana as defined in the applicable federal and state laws relating to narcotic drugs and marihuana.

History: En. Sec. 16, Ch. 307, L. 1967.

27-717. New drug application required—exemptions from requirement.
(a) No person shall sell, deliver, offer for sale, hold for sale or give away any new drug unless

(1) an application with respect thereto has been approved and said approval has not been withdrawn under section 505 of the Federal Act, or

(2) when not subject to the Federal Act, unless such drug has been tested and has been found to be safe for use and effective in use under the conditions prescribed, recommended, or suggested in the labeling thereof, and prior to selling or offering for sale such drug, there has been filed with the department an application setting forth

- (A) full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective in use:
 - (B) a full list of the articles used as components of such drug;

a full statement of the composition of such drug;

(D) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing and packing of such drug:

(E) such samples of such drug and of the articles used as compo-

nents thereof as the department may require; and

specimens of the labeling proposed to be used for such drug.

(b) An application provided for in subsection (a) (2) shall become effective on the one hundred eightieth day after the filing thereof, except that if the department finds, after due notice to the applicant and giving him an opportunity for a hearing, that the drug is not safe or not effective for use under the conditions prescribed, recommended or suggested in the proposed labeling thereof, he shall, prior to the effective date of the application, issue an order refusing to permit the application to become effective.

An order refusing to permit an application under this section to

become effective may be revoked by the department.

This section shall not apply—

- to a drug intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety and effectiveness of drugs, provided the drug is plainly labeled in compliance with regulations issued by the state board or pursuant to section 505 (i) or 507 (d) of the Federal Act, or
- (2) to a drug sold in this state at any time prior to the enactment of this act or introduced into interstate commerce at any time prior to the enactment of the Federal Act: or
- (3) to any drug which is licensed under the Virus, Serum and Toxin Act of July 1, 1902 (U.S.C. 1958 ed. title 42 chapter 6A sec. 262); or

(4) to any drug which is subject to section 27-715 (1) of this act.

- The provisions of section 27-702 (o) shall not apply to any drug which, on October 9, 1962 or on the date immediately preceding the enactment of this subsection,
 - was commercially sold or used in this state or in the United States,

(2) was not a new drug as defined by section 27-702 (o) as then in

force, and

(3) was not covered by an effective application under section 27-717 of this act or under section 505 of the Federal Act, when such drug is intended solely for use under conditions prescribed, recommended or suggested in labeling with respect to such drug.

History: En. Sec. 17, Ch. 307, L. 1967. ents or formula of patent or proprietary medicine. 1 ALR 1476.

Collateral References

Power to compel disclosure of ingredi-

27-718. Adulterated cosmetic defined. A cosmetic shall be deemed to be adulterated-

(a) If it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling or advertisement thereof, or under such conditions of use as are customary or usual. Provided, that this provision shall not apply to coal-tar hair dye, the label of which bears the following legend conspicuously displayed thereon: "Caution—This product contains ingredients which may cause skin irritation on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness," and the labeling of which bears adequate directions for such preliminary testing. For the purpose of this paragraph and paragraph (e) the term "hair dye" shall not include eyelash dyes or eyebrow dyes.

- (b) If it consists in whole or in part of any filthy, putrid or decomposed substance.
- (c) If it has been produced, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.
- (d) If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.
- (e) If it is not a hair dye and it is, or it bears or contains a color additive which is unsafe within the meaning of the Federal Act.

History: En. Sec. 18, Ch. 307, L. 1967.

27-719. Misbranded cosmetic defined. A cosmetic shall be deemed to be misbranded—

- (a) If its labeling is false or misleading in any particular.
- (b) If in package form unless it bears a label containing
- (1) the name and place of business of the manufacturer, packer, or distributor; and
- (2) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count: provided, that under clause (2) of this paragraph reasonable variations shall be permitted and exemptions as to small packages shall be established by regulations prescribed by the state board.
- (c) If any word, statement or other information required by or under authority of this act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.
 - (d) If its container is so made, formed or filled as to be misleading.
- (e) If it is a color additive, unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive prescribed under the provisions of the Federal Act. This paragraph shall not apply to packages of color additives which, with respect to their use for cosmetics, are marketed and intended for use only in or on hair dyes (as defined in the last sentence of section 27-718 (a)).

History: En. Sec. 19, Ch. 307, L. 1967.

27-720. False advertising—representation of curative properties deemed false advertising. (a) An advertisement of a food, drug, device or

cosmetic shall be deemed to be false if it is false or misleading in any particular.

(b) For the purpose of this act the advertisement of a drug or device representing it to have any effect in albuminuria, appendicitis, arteriosclerosis, blood poison, bone disease, Bright's disease, cancer, carbuncles, cholecystitis, diabetes, diphtheria, dropsy, erysipelas, gallstones, heart and vascular diseases, high blood pressure, mastoiditis, measels, meningitis, mumps, nephritis, otitis media, paralysis, pneumonia, poliomyelitis (infantile paralysis), prostate gland disorders, pyelitis, scarlet fever, sexual impotence, sinus infection, smallpox, tuberculosis, tumors, typhoid, uremia, venereal disease, shall also be deemed to be false, except that no advertisement not in violation of subsection (a) shall be deemed to be false under this subsection if it is disseminated only to members of the medical, dental, or veterinary professions, or appears only in the scientific periodicals of these professions or is disseminated only for the purpose of public health education by persons not commercially interested, directly or indirectly, in the sale of such drugs or devices: provided, that whenever the state board determines that an advance in medical science has made any type of selfmedication safe as to any of the diseases named above, the state board shall by regulation authorize the advertisement of drugs having curative or therapeutic effect for such disease, subject to such conditions and restrictions as the state board may deem necessary in the interests of public health: provided, that this subsection shall not be construed as indicating that selfmedication for diseases other than those named herein is safe or efficacious.

History: En. [Sec. 20,] Ch. 307, L. 1967.

27-721. Procedure for adopting, amending or repealing regulations—hearings. (a) The authority to promulgate regulations for the efficient enforcement of this act is hereby vested in the state board. The state board is hereby authorized to adopt by reference the regulations promulgated by the Food and Drug Administration under the Federal Act.

(b) Hearings authorized or required by this act shall be conducted by the state board or such officer, agent or employee as the state board may

designate for the purpose.

(c) Before promulgating any regulations contemplated by section 27-709; 27-711 (j); 27-712; 27-715 (d), (f), (g), (h), (m), and (p); 27-716 (e); or 27-720 (b), the state board shall give appropriate notice of the proposal and of the time and place for a hearing. The regulation so promulgated shall become effective on a date fixed by the state board (which date shall not be prior to ten (10) days after its promulgation). Such regulation may be amended or repealed in the same manner as is provided for its adoption, except that in the case of a regulation amending or repealing any such regulation the state board, to such an extent as it deems necessary in order to prevent undue hardship, may disregard the foregoing provisions regarding notice, hearing or effective date. No hearing will be required for promulgation by reference of those regulations promulgated under the Federal Act.

History: En. Sec. 21, Ch. 307, L. 1967.

27-722. Department's access to buildings and premises—examination of samples. The department or its authorized agents shall have free access at

all reasonable hours to any factory, warehouse, or establishment in which foods, drugs, devices or cosmetics are manufactured, processed, packed, held for introduction into commerce, or to enter any vehicle being used to transport or hold such foods, drugs, devices, cosmetics in commerce, for the purpose:

- (a) of inspecting such factory, warehouse, establishment or vehicle to determine if any of the provisions of this act are being violated, and
- (b) to secure samples or specimens of any food, drug, device or cosmetic after paying or offering to pay for such sample. It shall be the duty of the department to make or cause to be made examinations of samples secured under the provisions of this section to determine whether or not any provision of this act is being violated.

History: En. Sec. 22, Ch. 307, L. 1967.

- 27-723. Dissemination of information by department. (a) The department may cause to be published from time to time reports summarizing all judgments, decrees and court orders which have been rendered under this act, including the nature of the charge and the disposition thereof.
- (b) The department may also cause to be disseminated such information regarding food, drugs, devices, and cosmetics as the department deems necessary in the interest of public health and the protection of the consumer against fraud. Nothing in this section shall be construed to prohibit the department from collecting, reporting and illustrating the results of the investigations of the department.

History: En. Sec. 23, Ch. 307, L. 1967.

27-724. Hallucinogenic drugs—prohibitions. It shall be unlawful for any person to manufacture, possess, have under his control, sell, purchase, prescribe, administer, dispense or compound any hallucinogenic drug as defined in the present Federal Act unless authorized so to do by the department or under the provisions of the Federal Act.

History: En. Sec. 24, Ch. 307, L. 1967.

27-725. Penalties for violations relating to hallucinogenic drugs. Whoever violates any provision of section 27-724 shall, upon conviction, be fined not more than one thousand dollars (\$1,000) and be imprisoned not more than one (1) year. Whoever commits a second violation of any provision of section 27-724 shall, upon conviction, be fined not less than one thousand dollars (\$1,000) and be imprisoned not less than five (5) years nor more than ten (10) years.

History: En. Sec. 25, Ch. 307, L. 1967.

Compiler's Note

Section 26 of Ch. 307, Laws 1967 read "If any provision of this act is declared unconstitutional or the applicability there-

of to any person or circumstances is held invalid, the constitutionality of the remainder of the act and applicability thereof to other persons and circumstances shall not be affected thereby."

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